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Supreme Court of the United States

October Term, 1978

No. 78-269

MILGO ELECTRONIC CORPORATION and INTERNATIONAL COMMUNICATIONS CORPORATION,

Petitioners,

vs.

WESTERN ELECTRIC COMPANY, INC. and AMERICAN TELEPHONE & TELEGRAPH COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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MILGO ELECTRONIC CORPORATION and INTERNATIONAL COMMUNICATIONS CORPORATION,

Petitioners,

vs.

WESTERN ELECTRIC COMPANY, INC. and AMERICAN TELEPHONE & TELEGRAPH COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioners, Milgo Electronic Corporation and International Communications Corporation (hereinafter "Milgo"), pray that a Writ of Certiorari issue to review the opinions and decisions of the United States Court of Appeals for the Fifth Circuit rendered on March 6, 1978, and May 19, 1978, respectively, and to remand the case to the Court of Appeals for determination of Milgo's appeal. Alternatively, petitioners pray that a Writ of Certiorari issue to review the Order of September 18, 1976, of the United States District Court for the Southern District of Florida, and to determine whether the District Court improperly withheld jurisdiction over Milgo's antitrust counterclaims.

OPINIONS BELOW.

The opinion of May 19, 1978, of the Court of Appeals, on petition for rehearing is reported at 573 F.2d 255 (5th Cir. 1978), and is set forth in Appendix A. The opinion of March 6, 1978, of the Court of Appeals, is reported at 568 F.2d 1203 (5th Cir. 1978), and is set forth in Appendix B. The Order of February 3, 1977, of the Court of Appeals denying Western Electric Company's (hereinafter "Western") motion to dismiss the appeal, presently unreported, appears in Appendix C. The Order of September 18, 1976, of the United States District Court for the Southern District of Florida, presently unreported, is set forth in Appendix D. The Court of Appeals, in its decisions, dismissed Milgo's appeal of the District Court's order striking certain antitrust counterclaims on the ground that it lacked jurisdiction over the challenged conduct. As a result of the decisions of the Court of Appeals, Milgo will be forced to try equitable issues which have facts in common with the dismissed antitrust counterclaims before it will have the right to try the legal antitrust counterclaims before a jury.

JURISDICTION.

The first Order of the Court of Appeals for the Fifth Circuit was entered on March 6, 1978, and the second Order denying a timely filed petition for a rehearing was entered on May 19, 1978. This Petition for Writ of Certiorari was filed within 90 days from the entry of the last Order as required by §2101 of Title 28 of the United States Code. The jurisdiction of this Court is invoked under §1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals improperly dismissed Milgo's appeal, where such dismissal effectively forecloses Milgo's right to a jury trial, and where Milgo's loss of its right to a jury trial is irreparable and cannot be adequately remedied on appeal after a trial on the merits.

2. Whether the District Court improperly found Western to be immune from the antitrust laws, where there is no repugnancy between the regulatory provisions of the Communications Act and the antitrust laws, and where the pertinent standards set by the Communications Act and the antitrust laws are in harmony.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Constitutional provision at the heart of this Petition is the Seventh Amendment which states:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

The Statues involved include the Sherman Antitrust Act, 15 U.S.C. §1 *et seq.*, and the Clayton Act, 15 U.S.C. §12 *et seq.* (both Acts referred to herein as the "antitrust laws"); and the Communications Act of 1934, 47 U.S.C. §201 *et seq.*

STATEMENT OF THE CASE.

A. The Pertinent Pleadings.

Western sued Milgo for patent infringement in the United States District Court for the Southern District of Florida, case No. 74-1601-Civ-CA. As an affirmative defense to the patent suit Milgo alleged that Western and its affiliated companies had violated the Bell consent decree[1] and misused the patents in suit by (1) charging a discriminatory royalty rate, and (2) tying in a data access arrangement (DAA) with a license under the patents in suit to all licensees who desired to use the patented apparatus (data modems) made by a source other than Western.

Milgo has alleged in counterclaims against Western and in a complaint against the third party defendant American Telephone & Telegraph Company (hereinafter "AT&T"), that AT&T, Western and the Bell System Operating Companies had conspired to restrain trade in the telephone customer data modem market after this market was opened to competition by an order of the Federal Communications Commission (hereinafter "FCC").[2]

According to Milgo's allegations, AT&T and Western, acting in concert with the Operating Companies, (1) caused the Operating Companies to purchase all of their requirements of data modems from Western, and (2) filed a discriminatory DAA-tariff without the approval of the FCC, and (3) used the tariff to foreclose the data modem market to Western's competitors. The discriminatory DAA-tariff required that only those telephone company customers who chose to obtain data modems from a general trade supplier (such as Milgo), in lieu of an Operating Company, were saddled with an expensive and troublesome DAA interface device for connecting their modems to the AT&T switched telephone network. The District Court struck these counterclaims on the ground that the conspiracy was immune from the antitrust laws.

[1] *United States v. Western Elec. Co., et al.*, 1956 Trade Cases ¶68,246 (D.C. N.J. 1956).

[2] *Carterfone*, 13 FCC2d 420 (1968), recon. den. 14 FCC2d 571 (1968).

B. Brief History of the Challenged Conduct.

The patents in suit are directed to terminal equipment commonly called data modems. Generally, such modems function as an interface between computers, or other sources of digital information, and the telephone network. For example, a modem can be arranged to accept digital data signals (ones and zeros) from a computer and translate these signals into a signal format (continuously varying analog signal) which can be transmitted over a voice-grade telephone line. Another modem at the other end of the telephone line is arranged to receive the transmitted signal format and translate it back into the original digital data signals for use by another computer or a terminal device such as a video display unit.

Western is but one component of the massive vertically integrated Bell System structure which includes AT&T, Western, Bell Telephone Laboratories (hereinafter "Bell Labs"), and the 23 Operating Companies which are regionally distributed throughout the United States. AT&T is the parent and controlling corporation; Western is the manufacturing arm (and wholly owned by AT&T); Bell Labs is the research and development arm (the subject matter of the patents in suit was

developed at Bell Labs); and the 23 Operating Companies provide telephone services and equipment directly to over 80% of this nation's telephone customers.

AT&T and the Operating Companies determine the services, equipment and respective prices to be offered to customers, and then file tariffs with the appropriate federal and state regulatory agencies. Regulatory agencies such as the FCC can either approve, disapprove or permit the tariff to go into effect without approval and subsequently hold hearings on whether the tariffs are in compliance with the regulatory act. The FCC has no power to suspend a tariff other than for a specific time period which is too short to allow detailed hearings.[3]

Milgo is a small company which entered into the data modem business in the mid-1960's. At that time the market available to an outside manufacturer such as Milgo was small indeed because of a Bell System tariff which absolutely forbade the connection of any non-Bell equipment to the AT&T switched telephone network. That prejudicial practice of absolute non-interconnection was drastically changed by the FCC in 1968.[4]

In 1968, the FCC in *Carterfone* found that the challenged sections of the non-interconnection tariff were, and had been since inception, unreasonably discriminatory and therefore unlawful under §§201(b) and 202(a) of the Communications Act of 1934, Title 47 U.S.C. After *Carterfone*, the FCC ruled that customers could obtain their equipment such as data modems for connection to the switched telephone net-

[3]*See, In re AT&T "Foreign Attachment" Tariff Revisions,* 15 FCC2d 605 (1968), recon. den. 28 FCC2d 871 (1969).

[4]*Carterfone, supra.*

work from sources other than the Operating Companies. The FCC requested the common carriers, *i.e.*, AT&T, to file new tariffs which would carry out this mandate and placed the burden of proof on the carriers to establish, prior to the filing of a tariff, that any restrictive practices required by the carriers were in fact necessary and non-discriminatory.[5]

After the *Carterfone* decision, the Bell System made a business decision that, when a customer decided to obtain equipment such as a data modem from a source other than the Bell System, a DAA connecting arrangement provided by the telephone companies would be required to connect that modem to the switched network. When a customer obtained a modem from the Bell System, no DAA was to be required. This business decision was implemented by AT&T's Tariff 263, Sections 2.7.5, 2.7.6, 2.7.7 and 2.7.8.[6] Since as a practical matter, the Bell System only deals in Western modems, this policy was designed to prevent or severely hinder customers from obtaining modems from any source other than Western, thereby maintaining Western's monopoly in the telephone customer modem market.

Without approving the tariff, the FCC allowed it to go into effect pending FCC review as to its compliance with the law. The FCC did, however, warn AT&T that:

> "As a result of a series of conferences we have had with representatives of your company and representatives of other manufacturers and dis-

[5]First Report and Order (hereinafter "FRO"), 56 FCC2d 593 (1975), paragraph 10.

[6]FRO, *supra.*

tributors of customer-provided terminal devices, one issue has now crystallized to the point that substantial doubt exists as to whether the revised tariffs are reasonable, non-discriminatory and in compliance with the *Carterfone* decision . . .'"[7]

After establishing Docket 19528 and after several years of hearings, the FCC found that AT&T had not even attempted to meet its burden of proof that the tariff was non-discriminatory. As stated in the FRO:

". . . In the seven years which have elapsed since our *Carterfone* ruling, the carriers have been afforded ample opportunity to propose effective procedures and/or tariff conditions to prevent harm without unduly restricting a customer's basic right to make reasonable use of the facilities and services furnished by the carrier. This the carriers have failed to do . . ."[8]

The FCC concluded that Tariff 263 was unreasonably restrictive on a customer's right to make use of telephone lines [violative of 47 U.S.C. §201(b)], and that Tariff 263 constituted ". . . an unjust and unreasonable discrimination both among users . . . and among suppliers of terminal equipment . . ."[9] [violative of 47 U.S.C. §202(a)]. The unlawful carrier-initiated DAA provisions were stricken and a registration program was instituted by the FCC.[10] The FCC registration program applies to carrier-provided equip-

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[7]FCC letter to AT&T, dated December 16, 1971; attached as Appendix E.

[8]FRO, *supra*, paragraph 16.

[9]FRO, *supra*, paragraph 16.

[10]FRO, *supra*, paragraph 17 et seq.

ment (Western-made DAAs or modems) and non-carrier provided equipment (Milgo-made DAAs or modems) alike.

It is Western's and AT&T's anticompetitive conduct from 1968 through 1977 in (1) conspiring with the Bell Operating Companies to ensure that only Western's modems were handled by the Operating Companies, and (2) filing and using the discriminatory DAA tariff to coerce customers into obtaining their modems from the Operating Companies which forms the basis of one of Milgo's antitrust counterclaims and one of Milgo's equitable patent misuse defenses. Obviously, the misuse defense and the antitrust counterclaim have many factual issues in common, *i.e.*, was a DAA forced on only those modem users who elected to use modems manufactured from a source other than Western as a result of the AT&T initiated tariff in combination with the Bell System's purchasing policy.

C. Proceedings Below.

The District Court on September 18, 1976, by granting in part Western's motion for partial summary judgment, struck Milgo's counterclaims for violation of Sections 1 and 2 of the Sherman Act directed to the DAA anticompetitive conduct on the ground that the FCC had exclusive jurisdiction over such counterclaims. However, the court retained jurisdiction over Milgo's equitable defenses of patent misuse based on the DAA conduct. With respect to the dismissed DAA counterclaims, Milgo is entitled to a jury trial and made a timely request for a jury trial. The fact issues of Milgo's equitable DAA misuse defense are triable to the judge.

Milgo appealed the District Court's decision on the ground that the order was appealable under the collateral order doctrine or as an order refusing injunctive relief. In the alternative, Milgo requested the Court of Appeals issue a Writ of Mandamus to correct the manifest error of the District Court order in finding that Western was immune from the antitrust laws.

The Court of Appeals initially determined, by a first three-judge panel, that it had jurisdiction to hear the appeal on the dismissal of Milgo's counterclaims. After the issues on appeal were briefed and argued, the Court requested the parties to address the question of whether Milgo was still seeking an injunction with regard to the DAA conduct in view of the commencement of the registration program. Milgo responded that injunctive relief as to the specific DAA requirement would no longer be appropriate. Milgo, however, pointed out that the trial court had broad powers to award appropriate injunctive relief against a conspiracy after a trial on the merits. Milgo also indicated that it would seek appropriate injunctive relief against the conspiracy in light of the facts proven at the trial.

Subsequently, the Court of Appeals, through a second panel, dismissed the appeal on the grounds that the order was not appealable (1) under the collateral order doctrine because Milgo would suffer no irreparable injury if it had to wait until after trial to appeal the dismissal of the DAA tie-in antitrust counterclaims and then return to the District Court to try such claims, or (2) as an order refusing injunctive relief because the need for injunctive relief became moot during the pendency of the appeal. The Court of Appeals also refused to grant a writ of certiorari.

On petition for rehearing, Milgo strongly urged that the respective dismissals by the District Court and the Court of Appeals were tantamount to a denial of Milgo's right to a jury trial on the dismissed counterclaims. The Court of Appeals in its opinion denying the petition for rehearing indicated that there was a possibility that Milgo *might* get a jury trial.

Milgo urges that the *possibility* of preserving the right to a jury trial is not contemplated by the Constitution nor is it contemplated by the decisions of this Court.

REASONS FOR GRANTING THE WRIT.

I.

The Fifth Circuit's Dismissal of Milgo's Appeal Manifests a Clear Disregard for Milgo's Right to a Jury Trial.

A. Where Legal Claims and Equitable Claims in the Same Action Have Common Issues of Fact, the Right to a Jury Trial on the Legal Issues Must Be Jealously Guarded by the Courts.

The present posture of Milgo's right to a jury trial on the dismissed counterclaims is as follows. The misuse defense related to the DAA-tariff will be tried to the trial court, and the court will make the findings of fact with respect to the equitable misuse defense.[11] After the complete trial, Milgo can then appeal the dismissal of its antitrust counterclaims.

However, such an appeal could not adequately remedy Milgo's loss of a trial by jury if the Court of Appeals determines that the District Court had jurisdiction over Milgo's DAA-tariff related antitrust counterclaims. At that time, issues of fact common to the DAA-tariff related antitrust counterclaims will already have been tried by the District Court. Those determinations will be conclusively binding on any subsequent trial of Milgo's DAA-tariff related antitrust counterclaims through the doctrines of collateral estoppel and res judicata.

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[11]As discussed below, Milgo has no right to a jury trial on the misuse issue. The only way in which Milgo could get a jury trial on the misuse issue is through the remote possibility that Western and AT&T would consent to a jury trial on the misuse issue and that the trial court would order a jury trial based on such consent.

Therefore, the Orders of the District Court and the Court of Appeals effectively require that Milgo's DAA equitable claims are to be tried prior to Milgo's DAA legal claims, despite the fact that there are factual issues common to both claims. The curtailment of a right to jury trial, by a trial sequence which required that equitable claims be tried first, is the very situation which this Court has found to be impermissible.

This Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), is clearly on point and provides the basis upon which this case can be decided. In *Beacon Theatres*, this Court relied upon the following language from *Dimick v. Schiedt*, 293 U.S. 474 (1935), for granting certiorari:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that *any seeming curtailment* of the right to a jury trial should be scrutinized with the utmost care." 293 U.S. 474, at 486. (Emphasis added)

Such mandated close scrutiny was clearly not exercised by the Court of Appeals.

The *Beacon Theatres* case involved an order by the District Court which called for a trial wherein equitable claims were to be tried prior to legal claims although there were common issues of fact. This was found to be impermissible by this Court. Where legal claims and equitable claims in the same action involve common issues of fact, the paramount importance of first trying legal claims before a jury prior to the determination of equitable claims was set forth by this Court:

> ". . . only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Beacon Theatres, Inc. v. Westover, supra,* at 510-511 (Footnote 19 omitted).

In *Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962), this Court reaffirmed and reemphasized the importance of preserving a litigant's right to a jury trial:

> "That holding [in Beacon Theatres], of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such 'imperative circumstances', Beacon Theatres requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury." 369 U.S. 469, at 473 (Footnotes 7 and 8 omitted).

Similarly, there are no "imperative circumstances" in this case which justify denying Milgo's right to a jury trial on its DAA-tariff related antitrust counterclaims. It is imperative that Milgo's right to a jury trial be protected.

In both the *Beacon Theatres* and *Dairy Queen* cases, this Court held that the Court of Appeals erred in refusing to grant a writ of mandamus to compel a jury trial which had been improperly denied by the District Court. As stated by this Court in *Beacon Theatres:*

> "Respondent claims mandamus is not available under the All Writs Act, 28 U.S.C. §1651. What-

> ever differences of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled." 359 U.S. 500, 511 (Footnote 20 omitted).

Similarly, this Court in *Dairy Queen* stated that mandamus was appropriate to correct the error of a district court which refused a demand for a jury trial:

> "The Court of Appeals should have corrected the error of the district judge by granting the petition for mandamus." 369 U.S. 469, 480.

The case at bar is different from the *Beacon Theatres* and *Dairy Queen* cases only because of the contingency of a reversal of the District Court's immunity ruling. This difference does not change the mandate set out in these cases, that Milgo should not be deprived of a jury trial by a delay of an appellate review of the immunity ruling until after the other issues are tried.

B. The Court of Appeals Opinion on Milgo's Petition for Rehearing Begs the Question of Whether Milgo Has Been Foreclosed From a Jury Trial.

In its opinion of May 19, 1978, the Court of Appeals mischaracterizes Milgo's contention of loss of a jury trial as "conjectural". Such characterization is unfounded and, indeed, unsubstantiated by the Circuit Court's analysis of Milgo's predicament. Milgo's threatened loss is more than "conjectural", it is very imminent.

If anything in this matter might be characterized as "conjectural", it is the analysis by the Court of Appeals of how Milgo's right to a jury trial *might* be preserved. For example, the Court of Appeals stated:

"It *may* be that in the pending proceeding the district court will order a jury trial as a matter of right on such issues as may embrace the 'DAA facts' or it *may* order a jury trial with the consent of both parties." (Emphasis added).

Thus, the Court of Appeals alludes to the *possibility* that the DAA-tariff related facts are triable by a jury as a matter of right, and the *possibility* that Western would consent to a common law jury trial of the DAA-tariff related facts as provided for by Rule 39(c) of the Federal Rules of Civil Procedure.

In a similar vein, the Court of Appeals indulges in further speculation as to how Milgo's equitable defense might be triable as a matter of right since it is asserted as a defense to legal claims. In footnote 1, the Court stated:

"We note that Western Electric has prayed for an accounting for damages. Such a prayer ordinarily gives rise to a right to trial by jury, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477-80, 82 S.Ct. 894, 899-901, 8 L.Ed.2d 44, 51-52 (1962), which *perhaps* extends to the issue of patent misuse." (Emphasis added).

However, Milgo's threatened loss of a Constitutional right is not as mitigated as the Court of Appeals would have us believe. It should be pointed out that the Court of Appeals failed to cite any authority for its contention that Milgo might be entitled to a jury trial on the misuse issue as a matter of right. Moreover, the Court of Appeals failed to cite any authority for its apparent proposition that the trial judge had discretion to order a jury trial on Milgo's misuse issue

without the consent of Western and AT&T. It should also be pointed out that the *Dairy Queen* case makes no suggestion of extending the right to a jury trial to the equitable misuse defense which is asserted as a defense to a legal claim. *Dairy Queen* states that a legal claim cannot be taken from the province of a jury by assertions of an equitable defense to such a legal claim. *Dairy Queen* does not in any manner suggest that an equitable defense to a legal claim must necessarily be tried by a jury.

An equitable defense to a legal claim does not make the equitable defense triable by right to a jury, and the defense of patent misuse is equitable in nature.

It has been well established by this Court that patent misuse is an application of the equitable maxim of "unclean hands." In *Morton Salt Company v. Suppiger*, 314 U.S. 488 (1942), this Court stated with respect to a patent grant:

". . . the use of it [the patent] to suppress competition in the sale of an unpatented article may deprive the patentee of the aid of a court of equity to restrain an alleged infringement by one who is a competitor." 314 U.S. 488, 491.

This Court further stated:

"Equity may rightly withhold its assistance from such a use of the patent by declining to entertain a suit for infringement, and should do so at least until it is made to appear that the improper practice has been abandoned and that the consequences of the misuse of the patent have been dissipated." 314 U.S. 488, 493.

Thus, it should be clear that misuse is a defense to the equitable aspects of a patentee's claims for relief.

Further, it is well established that the doctrine of "unclean hands" is equitable in nature; and indeed, its application is within the discretion of the trial judge. In *Inland Steel Products Co. v. MPH Manufacturing Corp.*, 25 F.R.D. 238 (1959), the court, in holding that issues of patent validity and infringement were triable to a jury and that issues of patent misuse were triable only to the court, stated:

> "The defense of patent misuse has consistently been treated as an equitable defense; it is a branch of the doctrine of 'unclean hands.' See, e.g., *Morton Salt Co. v. G.S. Suppiger Co.*, 1942, 314 U.S. 488, 62 S.Ct. 402, 86 L.Ed. 363; *Gray Tool Co. v. Humble Oil & Refining Co.*, 5 Cir., 1951; 186 F.2d 365; *Mercoid Corporation v. Minneapolis-Honeywell Regulator Co.*, 7 Cir., 1942, 133 F.2d 811. Therefore, the misuse claims are not triable of right by jury." 25 F.R.D. 238, 247.

Moreover, if as suggested by the Court of Appeals that an equitable defense to a legal claim extends the right to a jury trial to the equitable defense, then the decisions of this Court in *Beacon Theatres* and *Dairy Queen* would have been unnecessary. The injury remedied in those cases was the denial of a right to a jury trial on legal issues which had facts in common with equitable claims which were to be tried first. If the equitable claims, by virtue of being related to legal claims, had been triable by right to a jury, then the order of trial would have been immaterial. However, since no such right to a jury determination attaches to equitable claims which are related to legal claims, this Court held that the order in which

equitable and legal issues are tried is of critical importance.

The suggestion by the Court of Appeals that the trial judge might have the discretion to order a jury trial without the consent of Western and AT&T is similarly untenable. Indeed, such a suggestion flies in the face of the words of Rule 39(c) of the Federal Rules of Civil Procedure which states in pertinent part:

> "In all actions *not triable of right by a jury*, the court . . . with the *consent of both parties*, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right." (Emphasis added).

Thus, since an equitable matter is clearly not triable by right to a jury, it is clear that any discretion the trial judge in this case might have with respect to ordering a jury trial on the misuse issue can be exercised *only* after both Western and AT&T consent to a jury trial on the misuse issue.

However, the suggestion by the Court of Appeals that Western might consent to a jury trial comes close to straw-grasping. It certainly would be unreasonable, if not reckless, to rely upon an opponent in a litigation to protect one's Constitutional rights. It certainly would not be in Western's best interests to consent to something which might be favorable to Milgo.

There are further problems with the suggestion by the Court of Appeals that Western might consent to a jury trial on the DAA misuse defense. Since facts involving the DAA misuse defense are common to the DAA antitrust counterclaims, any jury findings on such facts would be binding on AT&T in a subsequent trial on the antitrust claims, particularly since

AT&T is a party to this litigation. Therefore, AT&T's consent to a jury trial on the DAA misuse defense would be required in addition to Western's consent.

Thus, the threat to Milgo's Constitutional right is not as "conjectural" as the Court of Appeals would have us believe. Distilled to its essence, the opinion of the Court of Appeals indicates that Milgo's right to a jury trial is not irreparably threatened because there is an extremely remote possibility that both Western and AT&T will consent to a jury trial on the DAA facts, even if such consent would not be in the best interests of Western and AT&T.[12]

Such remote possibilities cannot be considered as sufficient safeguards to Constitutional rights. This Court in *Beacon Theatres v. Westover, supra,* did not even consider the possibility that the parties could consent to a jury trial on the equitable issues, even though such possibility may have existed, and even though a portion of the case before the District Court was to be tried to a jury. Similarly, this Court in *Dairy Queen v. Wood, supra,* did not consider the possibility of consent by the parties to a jury trial on equitable issues.

Although not discussed by the Court of Appeals, Milgo urges that an advisory jury impanelled to assist the trial judge in deciding equitable issues would not

[12]Western and AT&T are not likely to consent to a jury trial, in which event Milgo would probably have no means of appealing the loss of a jury trial to the Court of Appeals. Even if a jury trial on the misuse issue could be had, the procedural complexity of first trying the misuse issue, appealing the dismissal of Milgo's antitrust counterclaims, and subsequently trying the antitrust counterclaims in view of the prior findings on the misuse issue would be burdensome and wasteful for the litigants and the courts.

preserve Milgo's right to a jury trial. Rule 39(c) provides the basis for impanelling an advisory jury:

> "In all actions not triable of right by a jury, the court upon motion or of its own initiative may try any issue with an advisory jury . . ."

The rule itself makes clear that such an advisory jury does not fulfill the requirements of a traditional jury trial.[13]

As discussed above, consent of all parties to a jury trial is necessary in actions where there is no right to a jury trial. Only where such consent is present can the jury verdict have "the same effect as if trial by jury had been a matter of right." Rule 39(c), Federal Rules of Civil Procedure.

Thus, it is clear that impanelling an advisory jury for issues in an equitable matter is not the same as a jury trial on such equitable matter. If an advisory jury fulfills the right to a jury trial, and if a trial judge has discretion to order a jury trial on an equitable matter, then Rule 39(c) would be meaningless and superfluous.

C. Milgo Has Been Irreparably Harmed by the District Court's Dismissal of Milgo's DAA Antitrust Counterclaims and the Dismissal of Milgo's Appeal by the Court of Appeals.

Milgo therefore urges that, in view of the foregoing analysis of the present posture of this case, it has

[13]This is particularly true in view of the trial judge's discretion in submitting issues to an advisory jury. *Sheila's Shine Products, Inc. v. Sheila Shine, Inc.,* 486 F.2d 114 (5th Cir. 1973). Also, even with an advisory jury, the trial court has the ultimate responsibility of being the trier of fact in equitable matters, *Frostie Company v. Dr. Pepper Company,* 361 F.2d 124 (5th Cir. 1966), and the trial court's findings will be reviewed on appeal just as though no jury had been present. *Reed v. Riddle Airlines,* 266 F.2d 314 (5th Cir. 1959).

been irreparably harmed by the decisions below. Its Constitutional right to a jury trial has been effectively foreclosed, and appellate review after trial could not adequately remedy Milgo's loss of its Constitutional right.

The immediacy of Milgo's loss of a jury trial, coupled with the irreparable nature of such loss, calls for extraordinary relief which only the Court can provide. No other recourse is available to Milgo to protect its right to a jury trial.

II.

The District Court Erred in Finding That Western Is Immune From the Antitrust Laws.

In granting the Motion for partial summary judgment dismissing Milgo's antitrust counterclaims on the ground that it did not have jurisdiction, the District Court failed to abide by this Court's mandate that antitrust immunity is not to be lightly implied, and that implicit repeal of the antitrust laws by a regulatory statute is strongly disfavored. *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). The reason for only grudgingly granting antitrust immunity was stated in that case:

> "This canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here." 374 U.S. 321, 348.

Similarly, this Court in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), stated the national importance of the federal antitrust laws as follows:

> "We have long recognized that the antitrust laws represent a fundamental national economic policy

> and have therefore concluded that we cannot lightly assume that enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry." 383 U.S. 213, 218.

The pertinent regulatory act here involved is the Communications Act of 1934, 47 U.S.C. §201 *et seq.* Any immunity for Western's DAA related activities must be implied, for Congress provided only a limited specific antitrust exemption for telephone companies with respect to certain consolidations which have been certified by the FCC. 47 U.S.C. §221(a). Such express provision for limited immunity gives credence to the inference that Congress did not intend any other activities to be immune, for if Congress did so intend, it would have set forth its intent along with the express immunity.

In the absence of express Congressional language exempting a regulatory scheme from the antitrust laws, implied repeal of the antitrust laws will be found only where there is "plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 351; *United States v. National Associates of Security Dealers, Inc.*, 422 U.S. 659, 682 (1975); *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975). Moreover, the applicability of the antitrust laws will be repealed only to the minimum extent necessary to make the regulatory scheme work. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

Here, there is no repugnancy but, rather, harmony between the regulating provisions of the Communications Act and the antitrust laws. Applying the antitrust

laws to the challenged conduct would not subject Western and its co-conspirators to conflicting standards. The pertinent standard set out in the Communications Act forbids carriers from filing tariffs which provide for discriminatory or preferential treatment. 47 U.S.C. §202. The DAA-tariff 263 on its face provided for treatment which was preferential for the Operating Companies, and discriminatory with respect to the customers of the Operating Companies and to general trade suppliers (such as Milgo). The same standard of non-discrimination as mandated by the antitrust laws and the Communications Act, is applicable to the DAA conduct of Western and its co-conspirators. Indeed, the FCC found the tariff to be unlawful under the Communications Act for the same reason that Milgo alleges it to be unlawful under the Sherman Act; *i.e.*, the tariff is unreasonably discriminatory in favor of one supplier to the detriment of free competition in the telephone company customer equipment market.

The District Court, in striking the DAA counterclaims, failed to even make specific findings of repugnancy between the regulatory act and the antitrust laws, or of any grounds from which repugnancy could be reasonably concluded. Clearly, the importance of the antitrust laws dictates that some basis must be given for a finding of immunity. This is particularly true when consideration is given to the fact that neither Western nor the concerted action between the affiliated Bell System companies to maintain Western as the sole supplier of modems to the Operating Companies is subject to the regulatory scheme.

Further support for lack of immunity can be found with the FCC itself. In its amicus brief filed in *United States v. American Telephone & Telegraph Company*, CA-74-1698, District Court for the District of Columbia, the FCC states:

> "Carriers subject to FCC jurisdiction are required to file tariffs setting forth the rates, practices and regulations that govern their service offerings. 47 U.S.C. §203. These must be just and reasonable 47 U.S.C. §201, and they must not contain undue discriminations or preferences, 47 U.S.C. §202.
>
> * * *
>
> But rate filings generally proceed from the carrier's independent business judgment and the Communications Act does not require Commission approval either before or after the rates become effective without Commission scrutiny or approval.
>
> These carrier-initiated tariffs which have not been approved by the Commission do not in our opinion immunize the carrier against claims that the tariffs are anticompetitive. The courts have consistently exercised jurisdiction in antitrust cases attacking carrier practices and rates that purportedly were justified by tariffs on file with but not approved by the Commission. . ." (Pages 19 & 20)[14]

A further compelling reason for denying antitrust immunity to the DAA-tariff related activities is the finding of unlawfulness by the FCC of the DAA-

[14]The title page and pages 19 and 20 of the Amicus Brief are attached as Appendix F.

tariff. In *Carnation Company v. Pacific Westbound Conference, supra,* the statute involved there, the Shipping Act, included an express antitrust exception for rate-making activities which were *lawful* under the Shipping Act. This Court stated that the exemption "implies that unlawful rate-making activities are not exempt." 383 U.S. 213, 217. Similarly, in *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 306-307 (1973), this Court found that there need be no determination of antitrust immunity where particular acts have been found to be unlawful under the statute which is alleged to provide antitrust immunity.

It therefore follows that assertions of antitrust immunity under the Communications Act are meaningless where the very acts alleged to be immune have been found by the FCC to be in violation of the Communications Act.

This Court recently refused to grant certiorari to review a Ninth Circuit Court of Appeals holding directly in point to that requested by Milgo herein, namely that a common carrier is not immune from the antitrust laws because the challenged conduct was also subjected to regulatory proceedings. *Greyhound Corp. v. Mt. Hood Stages, Inc.,* .... U.S. ...., 57 L.Ed.2d 239, at 246, footnote 12 (1978).

In denying the carrier's claim of antitrust immunity, the Ninth Circuit Court of Appeals held:

> "Conduct is not immunized merely because it falls within the jurisdiction of the regulatory agency, as it did in this case. Immunity is not implied merely because the applicable regulatory standard requires the agency to give weight to antitrust policy, as it did in this instance. . .
>
> * * *
>
> "Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied. *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659, 682 (1975). . ." *Mt. Hood Stages, Inc. v. Greyhound Corp.,* 555 F.2d 687, 691-692 (9th Cir., 1977) (Footnotes omitted).

The trial court's order striking the antitrust counterclaims is contrary to the decisions of this court. The order should be reversed.

CONCLUSION.

Milgo's loss of its right to a jury trial is imminent, and the loss cannot be adequately remedied by appeal after a trial on the merits. Review by certiorari is the only effective means of assuring that Milgo will not lose its right to a jury trial.

It is therefore urged that this Court review and remand this case to the Court of Appeals with an order that the Court of Appeals decide the merits of Milgo's appeal which was directed to the issue of whether Western was immune from the antitrust laws.

Alternatively, petitioners urge that this Court should decide whether the District Court improperly found that Western is immune from the antitrust laws, since immediate determination of this question is necessary to preserve Milgo's right to a jury trial, and since

the District Court's determination of exclusive FCC jurisdiction is contrary to the decisions of this Court and critically erodes the national economic policy defined by the antitrust laws.

Respectfully submitted,

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APPENDIX A.

WESTERN ELECTRIC COMPANY, INC., Plaintiff-Appellee, v. MILGO ELECTRONIC CORPORATION and International Communications Corporation, Defendants-Third-Party Plaintiffs-Appellants, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Third-Party Defendant. No. 76-4079. United States Court of Appeals, Fifth Circuit. May 19, 1978.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before THORNBERRY, GODBOLD and FAY, Circuit Judges.

PER CURIAM:

Milgo urges that it is entitled to review under the collateral order doctrine because it is irreparably injured by possible loss of its constitutional right to jury trial. The argument runs this way. It demanded a jury trial on its counterclaims. However, those of its counterclaims which were based on the DAA requirement were dismissed by the summary judgment from which it is attempting to appeal. The facts involved in the DAA counterclaims are also involved in Milgo's patent misuse defense, and the trial of the proceeding below will be without a jury (at least as to those facts).[1] If eventually it should be determined that

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[1]Milgo has not told us whether it has requested a jury trial on the issues to which patent misuse is a defense or whether the district court has issued an order regarding jury trial; all it has told us is that it has demanded a jury on its counterclaims.

(This footnote is continued on next page)

the court erred in dismissing the DAA counterclaims Milgo will then be permitted to go to trial on these counterclaims, but, Milgo asserts, under the doctrines of res judicata or collateral estoppel the factual issues determined without a jury in the proceeding now pending will be determinative of the same factual issues in the later trial. Hence, Milgo may be denied a jury trial as to these facts.

At this point Milgo's contention is conjectural. It may be that in the pending proceeding the district court will order a jury trial as a matter of right on such issues as may embrace the "DAA facts," or it may order a jury trial with the consent of both parties.

If in the present proceeding below Milgo does not receive a jury trial on the "DAA facts," and ultimately it is allowed to go to trial on its DAA counterclaims, Milgo will be able to require a new trial before a jury unless the denial was harmless error. *See U. S. v. Williams*, 441 F.2d 637 (CA5, 1971); Wright & Miller, Federal Practice and Procedure § 2322. Milgo thus will not be irreparably injured.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service

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We note that Western Electric has prayed for an accounting for damages. Such a prayer ordinarily gives rise to a right to trial by jury. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477-80, 82 S.Ct. 894, 899-901, 8 L.Ed.2d 44, 51-52 (1962), which perhaps extends to the issue of patent misuse.

on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX B.

WESTERN ELECTRIC COMPANY, INC., Plaintiff-Appellee, v. MILGO ELECTRONIC CORPORATION and International Communications Corporation, Defendants, Third-Party Plaintiffs-Appellants, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Third-Party Defendant. No. 76-4079. United States Court of Appeals, Fifth Circuit. March 6, 1978.

Before THORNBERRY, GODBOLD and FAY, Circuit Judges.

GODBOLD, Circuit Judge:

Defendant Milgo appeals from the district court's order of summary judgment against it as to some of its counterclaims. We conclude that we lack jurisdiction to hear an appeal from this order.

I. Facts

Both Milgo and Western Electric[1] manufacture terminal equipment known as data modems. "Modem" is an acronym for "modulation and demodulation."[2] Modems, when connected to telephone lines, allow computers to send and receive information to and from each other. Western sued Milgo for infringement of Western's modem patents. Milgo counterclaimed for damages and injunctive relief, alleging violations of

[1]Western Electric is the manufacturing arm of American Telephone & Telegraph Company (the Bell System).

[2]"Foreign Attachment" Tariff Revisions in A.T.&T. Tariff FCC Nos. 263, 260, and 259, 15 F.C.C.2d 605, 607 (1968).

the antitrust laws and acts of unfair competition.[3] Each claim alleged two separate but, to Milgo's view, interrelated discriminatory practices employed by the Bell System. First, Bell has required customers using modems not of Western's design to install and lease a connecting device known as a Data Access Arrangement (DAA). Customers who use Western-designed modems are excused from this requirement. Second, Bell has required that customers who use modems of Western's design but manufactured by another source through a patent license pay a 2% royalty.

The district court's summary judgment dismissed those parts of the counterclaims based upon the DAA requirement. Its decision stemmed from the FCC's recent establishment of a registration program, 47 C.F.R. pt. 68, whereby terminal equipment and interconnection devices could be registered and approved by the FCC, and if a modem not of Western's design were registered, the use of an interconnection device would not be required.[4] The district court based its order on the

[3]Milgo also alleged a violation by Western of the terms of a 1949 antitrust consent decree requiring it to grant patent licenses on its equipment. *U. S. v. Western Elec. Co.*, 1956 Trade Cases ¶68,246 (D.N.J. 1956). The district court dismissed this part of the unfair competition counterclaim on the theory that consent decree violations can be used only as defenses and not as causes of action. Milgo has not appealed from the summary judgment against this counterclaim.

[4]*See First Report and Order in Docket No. 19528*, 56 F.C.C.2d 598 (1975), *aff'd, North Carolina Util. Comm'n v. FCC (North Carolina II)*, 522 F.2d 1036 (CA4, 1977), *cert. denied*, ... U.S. ....., 98 S.Ct. 222, 54 L.Ed.2d 154 (1977). Although modems were not specifically included

(This footnote is continued on next page)

doctrine of implied repeal, *see, e.g., Gordon v. New York Stock Exchange,* 422 U.S. 659, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1973), *U. S. v. National Association of Securities Dealers, Inc.,* 422 U.S. 694, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975), finding in particular that the antitrust laws were impliedly repealed in this area because of pervasive regulation by the FCC.

II. Appealability

By a one-sentence order dated February 3, 1977, a panel of this court denied Western's motion to dismiss Milgo's appeal.[5] The panel in effect determined that an appeal could be maintained, but we are not bound by this determination. *EEOC v. International Longshoremen's Association,* 511 F.2d 273, 276 n. 5 (CA5), *cert. denied,* 423 U.S. 994, 96 S.Ct. 421, 46 L.Ed.2d 368 (1975).[6]

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within the scope of the registration program, the FCC later established that they were included. *Memorandum Opinion and Order in Docket No. 19528,* 57 F.C.C.2d 1216, 1219 (1976).

[5]Motions to dismiss and various other prehearing matters are assigned to screening panels of this court, each composed of three judges designated for one-year periods. A case in which a motion to dismiss is denied will later fall to a screening panel—not necessarily the same one—for consideration of whether it will be assigned to the summary calendar or the oral argument calendar. If not placed on the summary calendar the case will be assigned to an oral argument panel for hearing and decision. The present panel is the oral argument panel.

[6]Action on a motion to dismiss before a case is assigned to an oral argument panel disposes of those cases in which appellate jurisdiction is clearly lacking so that the court and the advocates do not expend their efforts in a consideration of the merits that later would prove to be fruitless. Matters of appellate jurisdiction are also subject to scrutiny by the

Milgo has raised two possible grounds for appealability: whether the partial summary judgment is a final decision under the collateral order doctrine, hence appealable under 28 U.S.C. § 1291, and whether it is an interlocutory order refusing an injunction, hence appealable under 28 U.S.C. § 1292(a)(1). We conclude that the district court's order is not a final decision. We need not decide whether the district court's order is an interlocutory order refusing an injunction because the prayer for injunctive relief, which the order refused, is now moot.

(A.) Collateral order doctrine

Section 1291 confers on the courts of appeals "jurisdiction of appeals from all final decisions of the district

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oral argument panel to whom the case falls. In *EEOC v. International Longshoremen's Association,* we said:

> "Indeed, it might appear that once a panel of this Court had made a legal determination that jurisdiction exists, no subsequent panel on its own could make a contrary determination. Rather the original panel's action would appear, at the least, the law of the case, and could not be overruled except by this Court sitting en banc. Nonetheless, this Court has held that the panel deciding the case must make a de novo determination of jurisdiction. We have said: 'Although motions to dismiss have been denied under our administrative procedures, the Court of Appeals is not precluded from a further inquiry as to its jurisdiction and is not relieved of the duty to dismiss the appeal if it appears there is no jurisdiction.' *Austracan, Inc. v. M/V Lemoncore,* 5 Cir. 1974, 500 F.2d 237 at 239; *see also Cook v. Eizenman,* 5 Cir. 1963, 312 F.2d 134 at 136. Thus we must make the independent inquiry above."

511 F.2d 273, 276 n. 5 (CA5), *cert. denied,* 423 U.S. 994, 96 S.Ct. 421, 46 L.Ed.2d 368 (1975). In other circuits, *see Melendez v. Singer-Friden Corp.,* 529 F.2d 321 (CA10, 1976); *Cromaglass Corp. v. Ferm,* 500 F.2d 601, 604 n. 1 (CA3, 1974) (en banc).

court." 28 U.S.C. § 1291. Since the partial summary judgment against Milgo's counterclaims does not end the litigation, it can be a "final decision" only by virtue of the collateral order doctrine. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); *Abney v. U.S.*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *Litton Systems, Inc. v. Southwestern Bell Telephone Co.*, 539 F.2d 418 (CA 5, 1976); *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (CA5, 1977). The statutory basis for this doctrine is that a trial court's disposition that is not a final judgment may nevertheless be a final "decision" if it adjudicates an "important right" collateral to the cause of action asserted that would otherwise be "lost, probably irreparably" if review had to await a final judgment. *Abney, supra*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d at 659, *quoting Cohen, supra*, 337 U.S. at 546, 69 S.Ct. at 1225, 93 L.Ed. at 1536. We have granted review under the collateral order doctrine when we have found either that the order concerned an issue wholly separable from the remainder of the case or that irreparable injury will result. *See 21 Turtle Creek Square, Ltd. v. New York State Teachers' Retirement System*, 404 F.2d 31, 33 (CA5, 1968). In this case we find that the summary judgment neither concerns a wholly separable issue nor threatens irreparable injury.

To preserve even attenuated notions of finality, the collateral order doctrine requires a final disposition

of the question by the district court, not a disposition that is "tentative, informal or incomplete." *Cohen, supra*, 337 U.S. at 546, 69 S.Ct. at 1225, 93 L.Ed. at 1536; *see Abney, supra*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d at 659; *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1095 (CA5, 1977); 15 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3911, at 470, 478-79 (1976). The order appealed from here is not tentative. In view of the court's outright dismissal of the claims, any argument of tentativeness loses its force.[7]

The dismissal of the counterclaim on an implied repeal ground, although final, hardly constitutes an order "completely collateral to the cause of action asserted." *Abney, supra*, 431 U.S. at 658, 97 S.Ct. at 2040, 52 L.Ed.2d at 659. The district court's decision that certain counterclaims must fail by virtue of FCC regulation in a particular area is a decision sustaining

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[7]The district court's order reads in pertinent part:

> "The Court now has read the [FCC's] First Report and Order in Docket # 19528 (released November 7, 1975). It appears that the Commission therein established a registration program for customer-provided equipment. Allegations of registration in accordance with that Order are absent from Milgo's filings. Thus, *at this time*, it appears to the Court that those paragraphs of Milgo's counterclaim which allege unfair competition and antitrust claims based upon the tariff are not properly before this Court."

App. at 161 (emphasis added). The court's language "at this time" indicates not tentativeness, but rather that the court had changed its view after having been apprised of the exact nature of the registration program. Of course, under Federal Rule of Civil Procedure 54(b) the order "is subject to revision at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of all the parties."

a substantive defense to the cause of action asserted; it is a "step toward the final disposition of the merits of the case." *Id., quoting Cohen, supra,* 337 U.S. at 546, 69 S.Ct. at 1225, 93 L.Ed. at 1536. Indeed, if the DAA counterclaims were all this case were about, the order would represent the end of the case. Litigation continues only because a claim (patent infringement) and other counterclaims (discriminatory royalty) remain to be adjudicated.[8]

Nor can Milgo point to any right that would be "lost, probably irreparably," from waiting to appeal the DAA matters after decisions on its other counterclaims and on Western's infringement claim. The only injury Milgo may undergo here is that it may have to return to the district court to try those claims based on the DAA device. This is not enough. In sum, the order dismissing certain of Milgo's counterclaims is neither collateral nor irreparably injurious.

(B.) Interlocutory order refusing an injunction

Milgo claims alternatively that the district court's dismissal of those parts of its counterclaims that challenged the DAA interconnection requirement was a refusal of Milgo's request for injunctive relief and is

[8]Milgo based much of its argument on *Litton Systems, Inc. v. Southwestern Bell Telephone Co.,* 539 F.2d 418 (CA5, 1976), in which the court regarded as a collateral order a stay of an antitrust suit pending referral of an antitrust claim to state utility commissions so that they could clarify the degree of state action involved by virtue of their ratemaking. The court said that the stay pertained not to the merits of the claim but rather to the manner in which the case would be tried. 539 F.2d at 426. In this case, however, the court's order is not a stay pending referral but an outright dismissal.

therefore appealable under § 1292(a)(1).[9] We need not decide whether the order refused injunctive relief because the prayer for injunctive relief is now moot.

During the pendency of this appeal the FCC's registration program went into effect. All the parties recognize that this program prevents Bell from categorically requiring the use of DAAs with modems not of Western's design. Accordingly, there is no longer any need for injunctive relief against the DAA requirement, and the justification for appellate review under § 1292(a)(1) no longer exists.

By complaining against Bell's DAA policy, Milgo sought both injunctive relief and damages. The district court's order effectively refused not only injunctive relief but also an award for damages, which is not moot. Appellate review under § 1292(a)(1) is ordinarily confined to the injunctive aspects of the district court's order, *Abercrombie & Fitch Co. v. Hunting World, Inc.,* 461 F.2d 1040 (CA2, 1972); *Zwack v. Kraus Brothers & Co.,* 237 F.2d 255 (CA2, 1956); *Wrist-Rocket Manufacturing Co. v. Saunders Archery Co., Inc.,* 516 F.2d 846 (CA8), *cert. denied,* 423 U.S. 870, 96 S.Ct. 134, 46 L.Ed.2d 100 (1975); *see* C. Wright, Law of Federal Courts 513 (3d ed. 1976), but such confinement is a rule of judicial administration, not of jurisdiction. An appellate court has power to review the case to the extent it chooses

[9]"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;" 28 U.S.C. § 1292(a)(1).

to exercise it. *See Aerojet-General Corp. v. American Arbitration Association*, 478 F.2d 248, 252-53 (CA9, 1973); *Hurwitz v. Directors Guild of America, Inc.*, 364 F.2d 67, 69-70 (CA2, 1966). *See also Smith v. Vulcan Iron Works*, 165 U.S. 518, 524-25, 17 S.Ct. 407, 410, 41 L.Ed. 810, 812-13 (1897). Moore's Federal Practice ¶ 110.25[1], at 273. In this case where the injunctive aspects are moot and the justification for review under § 1292(a)(1) is no longer present, we doubt that we have the power to reach the remaining noninjunctive aspects of the district court's order, and, if we do, we decline to exercise it.

(C.) All Writs Act

The parties have also urged, somewhat tardily, that we should resort to the extraordinary writ of certiorari to allow interlocutory review. *See* All Writs Act, 28 U.S.C. § 1651. Such writs should be used to allow interlocutory review only in very limited and unusual circumstances. We believe that review by certiorari is not appropriate for this case.

The appeal is DISMISSED.

APPENDIX C.

In the United States Court of Appeals for the Fifth Circuit.

Western Electric Company, Inc., Plaintiff-Appellee, versus Milgo Electronic Corporation and International Communication Corporation, Defendants Third-Party Plaintiffs-Appellants, versus American Telephone and Telegraph Company, Third-Party Defendant. No. 76-4079.

Appeal from the United States District Court for the Southern District of Florida.

Before Clark, Gee and Fay, Circuit Judges.

BY THE COURT: IT IS ORDERED that appellee's motion to dismiss the appeal is DENIED.

APPENDIX D.

United States District Court, Southern District of Florida.

Western Electric Company, Inc., Plaintiff v. Milgo Electronic Corporation and International Communications Corporation, Defendants and Third-Party Plaintiffs v. American Telephone and Telegraph Company, Third-Party Defendant. Case No. 74-1601-Civ-CA.

Order Granting in Part and Denying in Part Motion for Summary Judgment.

THIS CAUSE is before the Court on motion of plaintiff Western Electric Company, Incorporated (hereinafter "Western") for summary judgment against defendants Milgo Electronic Corp. and International Communications Corporation (hereinafter "Milgo").

As grounds for its motion, Western asserts that Milgo has no standing to enforce the consent decree entered in the Government action against Western and has no standing to assert a claim for discriminatory royalties because Milgo has not applied for, and does not want, a license and therefore has not been damaged by the alleged discrimination.

Western strenuously argues that Milgo cannot show either actual or potential damages to itself resulting from Western's allegedly discriminatory licensing practices because Milgo is neither an applicant for a license nor a licensee of Western's patents. It is academic that injury in fact is a requirement for standing under the antitrust laws.

Plaintiff cites *GAF Corp. v. Circle Floor Co., Inc.*, 463 F. 2d 752 (2d Cir. 1972) where the Court held

that the facts alleged by plaintiff were not sufficient to state a claim for relief for damages to GAF's business by reason of a restraint of trade; that treble damages are available only to those who have suffered some dimunition of their ability to compete. Thus, this Court must look to the allegations found in the counterclaim against Western to determine whether Milgo has alleged competitive injury. In so doing, the Court must keep in mind the teaching of the Supreme Court *Hospital Building Co. v. Trustees of Rex Hospital,* #74-1452 (S. Ct. 5/24/76); and the Fifth Circuit, *Miller v. Grandados,* 529 F. 2d 393 (5th Cir. 1976), that complaints alleging antitrust violations are to be liberally construed. The inquiry, then, is whether Milgo's competitive business position was harmed by the anticompetitive effects of the alleged restraint of trade. *Perkins v. Standard Oil Co.,* 395 U.S. 642 (1969).

Milgo is a competitor of Western in the manufacture of telephone equipment. The market in which they compete is loosely defined as those who purchase and/or lease telephone equipment. Milgo has alleged that because of practices engaged in by Western; i.e., use of discriminatory royalty rates monopolization and attempted monopolization, and tieing the use of a DAA to all non-Western manufactured equipment, Milgo has suffered in that the class of telephone equipment purchasers/lessees are forced to pay more if they purchase/lease from Milgo and therefore purchase/lease from Western. These allegations, specifically stated in the counterclaim, allege competitive injury sufficient to confer standing.

Milgo's counterclaims were skillfully drafted in that there are very few references to violation of the consent

decree per se. Examination of the complained of sections shows that only paragraphs A-29(d) and (e) allege violations of the consent decree. Those paragraphs should be stricken. The remaining paragraphs, although alleging acts that may fall within the prohibitions of the consent decree, are couched in antitrust and unfair competition language and suffer no infirmity such that would cause this Court to strike them.

Western further attacks Milgo's assertion of paragraphs which constitute a challenge to tariffs filed with the FCC. In this Court's March 17, 1976 Order, there was a ruling that the issue of whether or not the tariffs which allowed plaintiff to require the use of a data access arrangement when non-Western manufactured equipment was used was a matter peculiarly suited for reference to the Federal Communications Commission (hereinafter "FCC"). At that point the Court did not have the benefit of the FCC Order entered in Docket #19528 before it.

The Court has now read the First Report and Order in Docket #19528 (released November 7, 1975). It appears that the Commission therein established a registration program for customer-provided equipment. Allegations of registration in accordance with that Order are absent from Milgo's filings. Thus, at this time, it appears to the Court that those paragraphs of Milgo's counterclaim which allege unfair competition and antitrust claims based upon the tariff are not properly before this Court.

The issue of claims based upon the alleged violations of the consent decree present a different problem. It is clear that this Court may entertain the alleged consent decree violations as a defense to the infringement action.

American Securit Company v. Shatterproof Glass Corporation (D.C. Del. 1957, 1958), 154 F. Supp. 890 and 166 F. Supp. 813, affirmed, 268 F. 2d 769 (3d Cir. 1959), cert. den. 361 U.S. 902, reh. den., 361 U.S. 973; *American Securit Company v. Hamilton Glass Company,* 258 F. 2d 889 (7th Cir. 1954). However, the violations, if any, of the consent decree do not give rise to an independent cause of action under the antitrust laws. *Paul M. Harrod Co. v. A. B. Dick Co.,* 194 F. Supp. 502 (N.D. Ohio 1961). The cases cited to the Court by Western show that the use of consent decree violations by defendants is limited to that of a shield and may not be extended as a sword.

Western also claims that the challenged practices are proper and refers to Paragraph X(C) of the consent decree to show that the practices are specifically authorized. It does not appear to the Court that there are no material facts in issue as to whether or not the challenged practices are proper and thus summary judgment would be improper at this time. Examination of the allegations shows that Milgo's claims are based on its assertion that Western and AT&T are related and therefore, while there is no requirement that the Bell Operating Companies pay royalties to Western, when the operating companies lease modems to subscribers without charging a royalty; it is the same as Western leasing the modems without charging a royalty. The underlying facts are heavily contested and preclude entry of summary judgment. Western further argues that research and development costs are passed on to operating company subscribers for whom a royalty is not separately stated and that these licensees suffer no economic disadvantage because, by buying the tech-

nology from Western, they have avoided incurring the expenses which the royalty is intended to recoup. Based on that statement, Western claims that Milgo's fundamental proposition is fallacious. However, it does not appear to be so clear cut to this Court. Milgo's argument in opposition is that if the research and development costs are billed to all subscribers, and if those subscribers who use non-Western manufactured modems pay equally with those who use Western manufactured modems and also pay the additional royalty, then the cost to non-Western manufactured modem users is higher and as a result Western's practices cause modem users to purchase from Western rather than Milgo.

In view of the foregoing, it is clear that most of the essential facts are in dispute and that granting of summary judgment would be improper.

It is ORDERED and ADJUDGED that Western's motion for summary judgment is denied, except as to paragraphs A-29(d) and (e) of the counterclaim and those paragraphs alleging unfair competition and antitrust claims based upon tariff #163. Accordingly, those paragraphs are hereby ordered stricken.

ENTERED at Miami, Florida, this 18th day of September, 1976.

/s/ Clyde Atkins
United States District Judge

cc: William E. Sadowski, Esq.
Michael J. Cappucio, Esq.
Albert E. Fey, Esq.
Stanley R. Jones, Esq.
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Dewey, Ballantine, Bushby, Palmer & Wood

APPENDIX E.

Federal Communications Commission
Washington, D.C. 20554
December 16, 1971

American Telephone and Telegraph Company
195 Broadway
New York, New York 10007
Attention: Mr. Thomas W. Scandlyn
Assistant Vice President

Gentlemen:

In its "foreign attachment" decisions of December 24, 1968 and August 13, 1969, the Commission permitted certain tariff revisions filed by AT&T, in response to our 1968 *Carterfone* decision, to go into effect subject to further action by the Commission. 15 F.C.C. 2d 605, 18 F.C.C. 2d 871.

One of the principal features of these revised tariffs was to provide that any customer-provided terminals device directly connected to the switched telephone network must be connected through (1) a "connecting arrangement" that would be "furnished, installed and maintained" only by the telephone company, and (2) a "network control signaling unit" that would likewise be "furnished, installed and maintained" only by the telephone company.

The Commission neither approved nor disapproved these revisions. It decided that, in lieu of further formal proceedings on questions as to the lawfulness thereof, it would be better for the Chief of the Common Carrier Bureau to conduct informal conferences for the purposes of identifying, examining and, subject to Commission review, resolving any questions presented by these re-

visions. The Commission said that these conferences would be the principal forum to assist it in ascertaining what further changes in the tariffs are necessary, desirable and technically feasible. The Commission further stated that it would "be prepared to take such further action as it deems necessary or desirable to resolve outstanding issues."

As a result of a series of conferences we have had with representatives of your company and representatives of other manufacturers and distributors of customer-provided terminal devices, one issue has now crystallized to the point that substantial doubt exists as to whether the revised tariffs are reasonable, nondiscriminatory and in compliance with the *Carterfone* decision insofar as certain practices thereunder are being followed by the company.

The practices in question relate to those terminal devices that are now being manufactured (or have been manufactured in the recent past) by independent manufacturers according to specifications of the telephone company and are now being furnished or offered (or have been offered or furnished in the recent past) by the telephone company to the public for direct connection to the switched telephone network under the trade mark, brand name or symbol of the independent manufacturer. Examples of these are the "Magicall" and "Code-A-Phone" devices.

The question of the lawfulness of the practice arises from the following facts. When such devices are furnished by the telephone company for direct connection, the customer is not required to obtain from the telephone company any additional or separate "connecting arrangement" or "network control signaling unit." These

features are generally incorporated into the device itself. However, if the same device is obtained by a customer from the same manufacturer for direct connection to the network, the current practice of the telephone company, under the present tariffs, is to refuse to provide service or to discontinue or threaten to discontinue the service of that customer if he uses that same device without obtaining a separate telephone company-provided connecting arrangement and network control signaling unit. This practice involves the imposition of extra charges and conditions upon customers who obtain these same devices from non-telephone company sources. Thus, the practice would appear to place independent suppliers of such devices at a competitive disadvantage in their efforts to market such devices directly to the public.

In connection with the foregoing we have examined the telephone company sales brochures for the "Magicall" and "Code-A-Phone." These brochures extol the qualities of these devices as though they were Bell System devices. Thus, for example, the Bell Systems brochure on the "Code-A-Phone" describes that device as "rugged," "dependable" and as "Bell System equipment." Moreover, according to these brochures, both the "Magicall" and the "Code-A-Phone" are provided to the customer with the manufacturers' registered trade mark on brand names thereon as well as the Bell System's symbol.

The apparent competitive disadvantage referred to above appears to be aggravated by the fact that certain competitive devices of other manufacturers are, contrary to the tariff requirement, being "hardwired" by non-telephone company installers to the switched telephone network without going through such additional tele-

phone company-provided facilities. We understand from the telephone company that it endeavors to enforce its tariffs where it learns of the existence of these cases, but that it has no way of assuring that there is general compliance with the tariffs. Under these circumstances it would appear that the independent manufacturers, who provide brand name devices to the telephone company and to the public according to specifications set by the telephone company are being prevented from effectively competing with either the telephone company, who markets the same device, or other manufacturers who are marketing competitive products.

When the Commission permitted the revised tariffs to go into effect on January 1, 1969, it was unaware of the existence of this apparent type of discrimination. However, as heretofore stated, one of the purposes of our informal conferences has been to identify and uncover problems such as this, and to take such steps as may be necessary to resolve them.

In view of all of the foregoing, we believe that the telephone company should promptly terminate its practice of refusing service or of discontinuing, or threatening to discontinue, the service of customers who obtain devices in the categories referred to above (e. g. the "Magicall" and "Code-A-Phone") and, further, that it should make such revisions in its tariffs as may be necessary to reflect such change in practice. This does not mean that the telephone company should not perform the actual "hard-wire" connection in accordance with the provisions of its tariffs applicable to the installation of the same device provided by the telephone company. Nor does it mean that the

company could not discontinue service to protect against actual harm as provided in other portions of the tariffs. It would mean that the company could not require separate connecting arrangements and network control units over and above those incorporated into devices which are built according to the telephone company specifications, and provided to customers under the brand name or symbol of the independent manufacturers. Under these conditions, customers obtaining such a device from the telephone company would be treated the same as one obtaining the same device from an independent manufacturer. This, in turn, would remove the competitive disadvantage to the independent manufacturer which would appear to result from your present practice.

We assume that you will take no steps to discontinue or threaten discontinuance of any existing service pending any necessary revisions in your tariffs.

In addition to the foregoing, and pending the development of appropriate standards to apply to all such devices, certain additional measures appear to warrant immediate consideration, particularly to avoid giving an unfair competitive advantage to the telephone company and the independent manufacturers who sell their brand name devices to the telephone company and to the public. First, the telephone company should permit other suppliers of terminal devices that are competitive with such brand name devices, to obtain direct connections by the telephone company of their devices on the same terms and conditions that apply in the case of such brand name devices. Second, the telephone company should publish and make available to all interested parties, and the Commission, the specifi-

cations which the telephone company has adopted for the manufacture of the aforementioned brand name devices insofar as such specifications are related to the prevention of harm to the switched telephone network from (i) improper signaling or (ii) line imbalance or (iii) excessive voltages. Third, the telephone company should continuously monitor each installation it makes under the foregoing revised practices and keep written records as to the occurrences, types and frequency of the harm allegedly caused by such devices and the disposition made thereof and should submit monthly reports thereon to the Commission.

These measures will enable other manufacturers and distributors, pending the development of more universal standards, to be treated the same as the telephone company and its brand name manufacturers in the direct connection of all such competitive devices. They will also assist in the gathering of empirical data relative to the nature and extent of "harm" to the network that such types of interconnection may occasion.

Your response within 10 days from the date of this letter will be appreciated.

Sincerely yours,

/s/ Bernard Strassburg
Bernard Strassburg
Chief, Common Carrier Bureau

cc: NARUC
USITA
General Telephone
United Telephone
Continental Telephone

APPENDIX F.

United States District Court for the District of Columbia.

United States of America, Plaintiff, v. American Telephone and Telegraph Company, Western Electric Company, Inc. and Bell Telephone Laboratories, Inc., Defendants. Civil Action No. 74-1698.

Memorandum of Federal Communications Commission as Amicus Curiae.

* * *

[Pages 19 and 20]

5. *Tariff Regulation.*

Carriers subject to FCC jurisdiction are required to file tariffs settting forth the rates, practices and regulations that govern their service offerings. 47 U.S.C. §203. These must be just and reasonable, 47 U.S.C. §201, and they must not contain undue discriminations or preferences, 47 U.S.C. §202. The Commission's authority for policing these requirements is specifically set forth in Sections 204 and 205 of the Act, 47 U.S.C. §§204, 205, which balance the interests of consumer and corporate investor. On the one hand, the consumer is entitled to service at rates that are just and reasonable; on the other, the carriers are entitled to a reasonable return so that the "vast sums necessary for the maintenance and expansion of their systems through equity and debt financing" will be available. *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division,* 358 U.S. 103, 113 (1958). As the Court said in the *United Gas* case, the consuming public has a vital stake in the financial stability of public utilities. *Id.*

The Communications Act, like other federal regulatory statutes, contemplates that the carrier in most

instances will initiate rate changes by filing new tariffs, and that those tariffs generally will go into effect without agency approval. *AT&T v. FCC*, 487 F.2d 865, 871-72 (2d Cir. 1973). *Cf. United States v. Southern Ry.*, 372 U.S. 658 (1963). The Commission may suspend tariff changes up to 90 days and initiate investigations to determine lawfulness. After full hearing, it may declare the tariffs unlawful and either require changes or prescribe changes of its own making. In addition, it may require refund of unlawful rates after hearing.[22] 47 U.S.C. §§ 204, 205. But rate filings generally proceed from the carrier's independent business judgment, and the Communications Act does not require Commission approval either before or after the rates become effective. It follows, then, that rates and other tariff provisions may and often do become effective without Commission scrutiny or approval.[23]

These carrier-initiated tariffs which have not been approved by the Commission do not in our opinion immunize the carrier against claims that the tariffs are anticompetitive. The courts have consistently exercised jurisdiction in antitrust cases attacking carrier practices and rates that purportedly were justified by tariffs on file with but not approved by the Commission.

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[22]The refund remedy, of course, can provide no relief to a competitor who alleges that the rates are so low as to be predatory. The Act simply contains no provisions for redressing such a wrong, even if the Commission after hearing finds that the allegations are true. See *Nader v. FCC*, Nos. 73-1045, 73-2051, D.C. Circuit, decided Sept. 29, 1975, slip opinion, pp. 1930, 1940.

[23]In a recent 12-month period (September 1974 through August 1975), the Commission received 1,371 tariff filings totaling 11,491 pages. This does not count the voluminous supporting papers filed with the tariffs. The Commission obviously could investigate only a small percentage of these filings.

See, *e.g.*, *Macom Products Corp. v. AT&T*, *supra*; *Chastain v. AT&T*, *supra*; *Carter v. FCC*, *supra*. As in the interconnection area, accommodation of antitrust policy to FCC regulation of tariff matters has been effected by referral under the doctrine of primary jurisdiction. *Id.*

The sole exception to this rule of concurrent jurisdiction arises when the Commission has prescribed or specifically approved a tariff.[24] Congress has entrusted the Commission with sole authority to prescribe and approve rates, practices, procedures and regulations set forth in tariffs. Even a court with . . .

---

[24]The difference between carrier-made and prescribed rates has been recognized in another context. See *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932), where the Court held that reparations could not be ordered if the carrier had charged rates prescribed by the Interstate Commerce Commission. See also *Public Utilities Commission of California v. FCC*, 356 F.2d 236 (9th Cir.), *cert. denied*, 385 U.S. 816 (1966). This principle remains valid. See *Nader v. FCC*, *supra*, slip opinion, p. 1936.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-[illegible]

MILGO ELECTRONIC CORPORATION and INTERNATIONAL COMMUNICATIONS CORPORATION, *Petitioners*,

v.

WESTERN ELECTRIC COMPANY, INC. and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

STATEMENT OF RESPONDENTS IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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September 15, 1978

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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STATEMENT OF RESPONDENTS IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

RESTATEMENT OF QUESTION PRESENTED

In respondents' judgment, this case presents only one question worthy of consideration by this Court. That question, properly stated, is:

> Whether antitrust liability can be imposed for the enforcement by a telecommunications common carrier of tariffs which have been the subject of active and pervasive regulation by the Federal Communications Commission.

COUNTER-STATEMENT OF THE CASE

This case, the bulk of which is still pending in the district court, was initiated by a complaint filed on behalf of respondent Western Electric Company, Inc. ("Western Electric"), the manufacturing arm of the Bell System, charging petitioners Milgo Electronic Corporation and International Communications Corporation ("Milgo") with infringing certain data modem patents. Milgo filed a counterclaim in which it alleged, among other things, that the tariffs of the Bell System companies setting forth the terms and conditions for the interconnection of customer-provided data modems —specifically, the requirement that such modems be connected to the nationwide telecommunications network only through a data access arrangement (DAA) —were unlawful under the antitrust laws.[1]

The petition for writ of certiorari filed by Milgo arises out of the decision of the district court granting in part a motion by Western Electric for summary judgment on Milgo's counterclaim by striking those paragraphs of the counterclaim attacking the Bell System's interconnection tariffs (App. 16). The ground of that decision was succinctly summarized by the Court of Appeals as follows (App. 5-6):

> "The district court based its order on the doctrine of implied repeal, *see, e.g., Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1973), *U.S.* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975), finding in particular that the antitrust laws were impliedly repealed in this area because of pervasive regulation by the FCC."

[1] This counterclaim is the only pleading properly involved in Milgo's petition. Although Milgo filed a third-party complaint against Western's parent, American Telephone and Telegraph Company ("AT&T"), and although Milgo's petition for certiorari names AT&T as a respondent, the district court has taken no action on Milgo's third-party complaint against AT&T.

Despite the fact that the district court refused Milgo's request to certify this order for immediate interlocutory review under 28 U.S.C. § 1292(b), Milgo filed an appeal with the Court of Appeals for the Fifth Circuit and requested, in the alternative, review under the All Writs Act (28 U.S.C. § 1651). On March 6, 1978, the Court of Appeals dismissed Milgo's appeal, holding that the order of the district court was not appealable (App. 6-12), and declined to provide review under the All Writs Act (App. 12). On May 19, 1978, the Court of Appeals denied Milgo's petition for rehearing and rehearing en banc (App. 1-3).

RESPONSE TO PETITIONERS' REASONS FOR GRANTING THE WRIT

Milgo advances two grounds in support of the issuance of a writ of certiorari in this case. The first—that Milgo might possibly be foreclosed from a jury trial on certain aspects of its antitrust counterclaim—is wholly lacking in merit for the reasons set forth in the opinion of the Court of Appeals denying Milgo's petition for rehearing (App. 1-3) and requires no further discussion.[2] The second—that the holding of the district court,

[2] In addition to the elaborate hypothetical sequence of possible events upon which Milgo's jury trial argument is based, Milgo has expressed doubt as to whether it will actually seek a jury trial. Thus, Milgo carefully hedged its jury trial argument in the Court of Appeals, stating that it "might at a later time decide to waive its right to a trial by jury in order to have the issue of patent misuse heard first by the court" (Milgo Brief on Appellate Jurisdiction, p. 13).

that the Bell System's enforcement of its interconnection tariffs is immune from antitrust attack, is in conflict with the decisions of this Court—is also without merit. Nonetheless, respondents do not oppose the issuance of a writ of certiorari on the antitrust immunity question for the reasons set out below.

The antitrust immunity issue is of great importance both to the telecommunications industry and to the public. The instant case is one of at least twenty antitrust cases instituted during the past several years attacking the same tariff. In each of these cases, the contention is advanced that the conduct of the telephone company in the enforcement of its tariffs must be judged as if it were operating in an environment of free and unfettered competition as envisoned by the antitrust laws. On the other hand, Title II of the Communications Act of 1934, which governs the specific conduct involved in these cases, is premised upon the assumption that telecommunications common carriers will follow a public interest standard—not a competition standard—in the activities in which they engage subject to pervasive regulatory supervision. Consequently, antitrust immunity is necessitated. *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975). Nevertheless, the uncertainty generated by the threat of imposition of conflicting standards and the pendency of this tide of litigation is debilitating to the telecommunications industry. In similar circumstances, this Court has exercised its discretion to review antitrust immunity issues of precisely the kind involved here. See, *e.g.*, *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975). It should adopt that same course here.

Review by this Court of the fundamental jurisdictional issue presented here is also justified by considerations of judicial economy. The numerous antitrust cases pending against the Bell System companies and the repetitive consideration of issues identical or similar to the issue presented by the petition here are consuming enormous judicial resources. If, as respondents believe, the issues presented in all, or virtually all, of these cases are beyond the proper jurisdiction of an antitrust court, these judicial efforts are simply being wasted. Even if respondents are wrong and some or all of the complaints involved are within the proper jurisdiction of an antitrust court, the judicial resources being expended on resolution of this jurisdiction issue are being wasted. In either event, considerations of judicial economy strongly suggest that this Court should hear and definitively resolve the jurisdictional issue presented in the petition. See *Schlagenhauf* v. *Holder*, 379 U.S. 104, 111-12 (1964); *Far East Conf.* v. *United States*, 342 U.S. 571, 572 (1952).[3]

---

[3] On January 6, 1977, and again on September 8, 1977, respondents Western Electric, AT&T and other Bell System companies filed petitions for certiorari in this Court in an effort to obtain review of the preliminary jurisdictional ruling of the district court in *United States* v. *American Tel. & Tel. Co.*, 427 F. Supp. 57 (D.D.C. 1976), in which Judge Waddy determined that a complaint attacking the conduct of the Bell System in virtually every facet of the telecommunications industry could not be summarily dismissed at the outset of the litigation for lack of jurisdiction, because he concluded that he must have "antitrust jurisdiction of at least some of the aspects of the case" (*id.* at 61). Those petitions were denied. 429 U.S. 1071 (Jan. 25, 1977); 434 U.S. 977 (Nov. 28, 1977). In an opinion issued on September 11, 1978, Judge Greene, who replaced Judge Waddy on the case, reconsidered the issue and again concluded that the court has antitrust jurisdiction. The instant case differs because, unlike the broad and indefinite character of the charges involved in the Government case, this case presents for review a narrow and precise question definitively resolved by the district court.

Lack of judicial unanimity portends that this Court will inevitably be called upon to determine the antitrust immunity issue. The decision of the district court in this case is one of six lower court decisions specifically holding that enforcement of the tariffed terms and conditions for the interconnection of customer-provided terminal equipment is immune from the antitrust laws under the principles established by this Court. In *Monitor Business Machines, Inc.* v. *American Tel. & Tel. Co.*, 1978-1 Trade Cases ¶ 62,030 (C.D. Cal. 1978), for example, the court held that (*id.* at 74,445):

> "The situation in this case is analogous to that in *Gordon* and *N.A.S.D.* The regulatory control of customer-provided interconnection devices by the F.C.C. under the public interest is incompatible with concurrent regulation under the antitrust laws."

Accord Phonetele, Inc. v. *American Tel. & Tel. Co.*, 435 F. Supp. 207 (C.D. Cal. 1977), *appeal docketed*, No. 77-3877 (9th Cir.); *Essential Communication Systems, Inc.* v. *American Tel. & Tel. Co.*, 446 F. Supp. 1090 (D.N.J. 1978); *DASA Corp.* v. *General Telephone Co.*, 1977-2 Trade Cases ¶ 61,610 (C.D. Cal. 1977), *appeal docketed*, No. 77-2936 (9th Cir.); and *Selectron, Inc.* v. *Pacific Northwest Bell Tel. Co.*, Civil No. 76-965-BE (D. Ore. June 19, 1978).

On the other hand, in *Jarvis, Inc.* v. *American Tel. & Tel. Co.*, Civil Action No. 74-1698 (D.D.C. August 7, 1978), the court denied a motion to dismiss an antitrust complaint attacking the same interconnection tariffs, holding that dismissal of these claims could not be justified, because the specific provisions of those tariffs had been initially filed by the carrier. And in *United States* v. *American Tel. & Tel. Co.*, Civil Action No. 74-1698 (D.D.C. September 11, 1978), the court has recently held that none of the Bell System's tariff activities are protected from the Sherman Act by FCC regulation (see note 3 *supra*). Respondents believe that the decisions in *Jarvis* and the Government case are erroneous.[4] However, it may be several years before those decisions are reviewed on appeal. In the meantime, those decisions threaten to cause misapplication of this Court's opinions on the question of implied antitrust immunity in many other pending antitrust cases attacking the enforcement of Bell System tariffs.[5]

[4] On August 17, 1978, the defendants in *Jarvis* filed a motion to certify the court's order of August 7, 1978, for immediate appellate review under 28 U.S.C. § 1292(b). That motion has not yet been ruled upon by the court.

[5] See, *e.g.*, *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, Civil Action No. B 75 319 (D. Conn.); *Sound, Inc.* v. *American Tel. & Tel. Co.*, Civil Action No. 76-186-2 (S.D. Ia.); and *Interconnect Planning Corp.* v. *American Tel. & Tel. Co.*, Civil Action No. 77-1584 (RO) (S.D.N.Y.), in each of which a motion to dismiss on the precise ground involved in this case is pending decision.

CONCLUSION

Notwithstanding the fact that the decision below is in complete accord with this Court's decisions, there will be no surcease of litigation on the antitrust immunity issue until it is definitively resolved by this Court. Respondents therefore do not oppose the issuance of a writ of certiorari to review the decision below.

Respectfully submitted,

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Respondents.

Reply of Petitioners to Respondents' Statement.

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Respondents.

Reply of Petitioners to Respondents' Statement.

Petitioners hereby reply to matters and arguments first raised by respondents in response to the petition.

Respondents ostensibly agree with the Court of Appeals decision on Milgo's petition for rehearing while substantively failing to offer to consent to a jury trial on the equitable misuse issue, despite the suggestion from the Court of Appeals that such consent would be an adequate safeguard of Milgo's right to a jury trial. Further, respondents have mischaracterized and misapplied the cited recent district court decisions dealing with antitrust immunity. Finally, respondents have presented an incomplete picture with respect to the district court decisions dealing with antitrust immunity since it made no mention of *Macon Products Corporation v. American Telephone & Telegraph Company*, 359 F.Supp. 973 (C.D.Ca. 1973), or the decision

in *International Telephone and Telegraph Corporation v. General Telephone & Electronics Corporation*, Civil Action No. 2754 (D. Hawaii, February 28, 1978),[1] which are both very pertinent to the question of Western Electric Company's (hereinafter Western) immunity.

In its response, respondents state that Milgo's reason for granting the writ based on its loss of its right to a jury "is wholly lacking in merit" and "requires no further discussion," relying solely on the Court of Appeals decision on Milgo's petition for rehearing. Milgo urges that such response evades the issue, particularly the discussion by the Court of Appeals of possible safeguards for Milgo's constitutional right to a jury trial.

The Court of Appeals stated that the trial judge might order a jury trial on the DAA-misuse issue with the consent of both parties, thereby clearly giving respondents the opportunity to stipulate to a jury trial on the DAA-misuse issue. The language of the Court of Appeals clearly refers to Rule 39(c) of the Federal Rules of Civil Procedure and is very similar to the language of the rule.

However, respondents have made no effort to consent to a jury trial on the DAA-misuse issue. In fact, respondents have clearly indicated that no consent will be forthcoming by their unyielding assertion of the correctness of the decisions below, their assertion of immunity,[2] and their regard that the jury trial issue "requires no further discussion."

[1]This decision is currently unreported, but is quite lengthy and therefore, not attached.

[2]AT&T, through the reply of the Bell System respondents in FCC Docket No. 19419, indicated at page 23 that since the antitrust laws are not applicable in court proceedings

Therefore, the safeguards asserted by the Court of Appeals, and ostensibly adopted by respondents, are illusory since the only viable safeguard, namely consent by respondents, is clearly beyond reach.

Further, respondents' characterization of the state of district court decisions dealing with antitrust immunity is misleading. Contrary to respondents' assertions, the decisional law most relevant to this case indicates that the balance tips in favor of no antitrust immunity. *Macon Products Corporation v. American Telephone and Telegraph Company, supra,* and *General Telephone & Electronics Corporation, supra,* both held that communications common carriers are not immune from the antitrust laws. As previously indicated, these decisions were not mentioned by AT&T.

Moreover, the decisions relied upon by respondents are inapposite and distinguishable. In particular such decisions merely state conclusions of immunity without a thorough analysis of the actual nature of the FCC regulation and do not consider to what extent the allegedly immune acts were required by the FCC, or condoned by the Communications Act. Thus, such cases failed to consider the practical nature and extent of regulation.

However, a decision adverse to respondents in *United States v. American Telephone & Telegraph Company*, Civil Action No. 74-1698 (D.D.C. September 11, 1978),[3] and therefore glossed over by respondents as

involving AT&T, the antitrust laws are not applicable in an FCC proceeding. The cover sheet and page 23 of the Bell System reply is attached as Appendix A.

[3]Judge Greene's decision was entered subsequent to the filing of the petition here involved. The cover page and pages 6 through 22 of Judge Greene's decision are set forth in Appendix B.

being "erroneous", sets forth the most cogent reasoning of all the courts which considered whether communications common carriers are immune from the antitrust laws. In that decision, the court set forth a thorough analysis of the practical nature of FCC regulation, and the relationship between such regulation and the conduct alleged to be immune.

For example, the court stated at page 12:

> "To carry that burden, defendants rely on the Supreme Court decisions[4] discussed above which found certain companies to be immune from the antitrust laws based upon a degree of regulation by government agencies which, as a practical matter, left them no choice but to follow the regulatory schemes and orders. But such regulation is not present in this case."

The court further stated at page 16:

> "The statutory weaknesses, the general ability of the Commission to scrutinize all the tariffs submitted to it, and perhaps other factors (e.g., the lack of adequate resources effectively to regulate AT&T, a corporate giant), have produced the result of a far less than pervasive or specific regulation of the areas that are critical to this case. In any event, whatever the reasons, it is clear that regulation of defendants' conduct has not been such that this antitrust action should disturb or interfere with it." (Footnotes omitted.)

The rationale of the court is best summarized by reference to the court's own words at page 19:

[4]The decisions referred to by the district court include *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), and *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975).

> "In short, it would be a gross misconception of the realities to equate the instant statutory scheme, the relatively weak regulatory controls which have implemented that scheme, and defendants' alleged activities which offend both the antitrust laws and the regulatory purposes, with the kind of explicit regulation endorsing industry conduct which the Supreme Court has held in relatively few instances to be inconsistent with antitrust enforcement." (Footnote omitted.)

Moreover, the court in *United States v. American Telephone and Telegraph Company, supra,* recognized the very fallacy involved in this case, namely that Western *cannot* be immune since it is not regulated. The court also pointed out that the challenged conduct revolved around the relationship between AT&T, Western, and Bell Labs and therefore could not be immune.

In this case, Milgo similarly charges that the conduct between AT&T, Western, and Bell Labs was violative of the antitrust laws.

Conclusion.

Petitioners therefore urge that this Court issue the requested writ as defined in the petition.

Respectfully submitted,

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APPENDIX A.

Reply of the Bell System Respondents.

Before the Federal Communications Commission, Washington, D. C. 20554.

In the Matter of American Telephone and Telegraph Company Long Lines Department (AT&T) Revisions of Wide Area Telephone (WATS) Private Line Service (PLS) Tariff F.C.C. No. 260 and The Western Union Telegraph Company (Western Union) Revisions of Tariff F.C.C. No. 254. Docket No. 19419.

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32. Thus, it is clear that what is "anticompetitive" in the sense of unfairly or unjustifiably restricting the competitive process depends upon what are the competitive rules. In this proceeding these rules are not as the antitrust courts conceive them for unregulated companies but as the Commission has established them for pervasively regulated telecommunications carriers.*

*The Supreme Court has recognized the inapplicability of the antitrust laws to pervasively regulated conduct and to conduct which is effectively regulated under a standard which is different from, and inconsistent with, the unidimensional competition standard of the antitrust laws. *See, e.g., Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659 (1975); *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975). And antitrust immunity has been specifically found in several recent antitrust cases attacking the terms, implementation and enforcement of the tariffs governing interconnection of customer-provided equipment and the requirement for protective connecting arrangements, including DAA's, and also attacking various pricing, marketing, and related activities of regulated telecommunications carriers. *See, e.g., Phonetele, Inc. v. American Tel. & Tel. Co.*, 435 F. Supp. 207 (C.D. Cal. 1977), *appeal pending; Dasa Corp. v. General Tel. Co. of Calif.*, 1977-2 Trade Cas. ¶ 61,610 (C.D. Cal. 1977) *appeal pending; Western Elec. Co. v. Milgo Electronic Corp.*, 1978-1 Trade Cas. ¶ 61,960 (S.D. Fla. 1976), *appeal dismissed*, 568 F.2d 1203 (5th Cir. 1978); *Essential Communications Sys., Inc. v. American Tel. & Tel. Co.*, 445 F. Supp. 1090 (D.N.J. 1978); *Mobilfone v. Commonwealth Tel. Co.*, 1978-1 Trade Cas. ¶ 61,873 3d Cir. 1978), aff'g 428 F. Supp. 131 (E.D. P. 1977); *Monitor Business Mach., Inc. v. American Tel. & Tel. Co.*, 1978-1 Trade Cas. ¶ 62,030 (C.D. Cal. 1978); *Selectron, Inc. v. Pacific Northwest Bell Tel. Co.*, Civ. No. 76-965-BE (D. Ore., June 19, 1978). The principle that the antitrust laws have been held inapplicable in a proceeding ostensibly brought under such laws make such laws *a fortiori* inapplicable to a proceeding brought under the Communications Act.

APPENDIX B.

Opinion.

United States District Court, for the District of Columbia.

United States of America, Plaintiff, v. American Telephone & Telegraph Company; Western Electric Co., Inc.; Bell Telephone Laboratories, Inc., Defendants. Civil Action No. 74-1698.

Filed: Sept. 11, 1978.

The motions before the Court address the Court's jurisdiction and they raise fundamental issues concerning the discovery that should govern the future path of this antitrust litigation. A recapitulation of the history of this case will be helpful to an understanding of these issues.

The complaint was filed on November 20, 1974. It alleges violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, by the American Telephone and Telegraph Company (AT&T),[1] Western Electric Company,

[1]According to the government, AT&T is organized under the laws of the State of New York, with the stock of Western Electric, fifty per cent of the stock of Bell Labs, and all or part of the stock of the 23 Bell Operating Companies as its principal assets. It is divided operationally into two major divisions: Long Lines and the General Departments. Long Lines, which has a certificate of convenience and necessity from the Federal Communications Commission, provides interstate telephone service, and files tariffs with the Commission governing the terms, rates and conditions of its service. The General Departments provide AT&T, Western Electric, Bell Labs, and the Bell Operating Companies with various kinds of advice and assistance. The General Departments have no federal or state certificates of public convenience and they file no tariffs.

Inc. (Western Electric),[2] and Bell Telephone Laboratories, Inc. (Bell Labs).[3] In sweeping language the complaint alleges that an unlawful combination and conspiracy exists and has existed for many

been attempted has been the subject of intense controversy.

The case was assigned to this Court on June 22, 1978. On July 6, 1978, the parties were directed to file status memoranda on all outstanding issues, and on August 21, 1978, argument was heard on these matters.[16] While these issues arose in varying procedural contexts, they may conveniently be discussed under four headings: (1) jurisdiction, (2) the nature of the plaintiff, (3) the government's effort to secure access to documents collected in several private antitrust suits brought against defendants in other districts, and (4) the future course of this action, including the scheduling of proceedings and the authority of the Magistrate and the Special Masters.

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[2]Western Electric is the 12th largest individual corporation in the United States, with sales of over $7 billion. It owns fifty per cent of the stock of Bell Labs, and it has at least one wholly owned subsidiary. It is not regulated by any federal or state regulatory authority. See pp. 12-14, *infra*.

[3]Bell Labs is owned in equal parts by AT&T and Western Electric. It conducts research and development, primarily for AT&T, Western Electric, and Bell Operating Companies. Like Western Electric, it is not regulated by any federal or state regulatory authority. See pp. 12-14, *infra*.

[16]Because of the illness and death of Judge Joseph C. Waddy, to whom the case had originally been assigned, several motions were reargued to this Court.

I

In all of their submissions to this Court, defendants have vigorously and consistently raised the jurisdictional issue. They insist that an irreconcilable conflict exists between the antitrust laws and the regulatory scheme established by the relevant statutes,[17] that when there is such a conflict the antitrust laws must give way, and that therefore the Court lacks jurisdiction over this action. While in many respects defendants' contentions constitute reargruments of matters rejected by Judge Waddy in his order of November 24, 1976, in view of the importance of this issue, and since a claim of lack of jurisdiction may be raised and entertained at any time (Rule 12(h)(3), F.R.Civ.P.), I have independently considered the jurisdictional issues. Upon such reconsideration, I concur with Judge Waddy's conclusion that regulation by the Federal Communications Commission and state regulatory bodies does not immunize defendants from this antitrust action.

Telecommunications carriers clearly do not enjoy an express statutory immunity from antitrust enforcement with respect to the activities here involved. While Congress has not hesitated in so many words to exempt the practices of other industries from the antitrust laws,[18] and while it has statutorily exempted some

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[17]Principally the Communications Act of 1934, 47 U.S.C. § 151, et seq.

[18]*E.g.*, insurance (McCarran-Ferguson Act, 15 U.S.C. § 1012); air transportation (Federal Aviation Act, 49 U.S.C. § 1384); export trade associations (Webb-Pomerene Act, 15 U.S.C. § 62); surface transportation (Reed-Bulwinkle Act of 1948, 49 U.S.C. § 56(9)).

activities of telephone companies from those laws,[19] it has not done so with respect to the conduct which is the subject matter of this complaint. Likewise, defendants have cited nothing in the legislative history of the statutes regulating the telecommunications industry which would lead to the conclusion that an antitrust immunity was contemplated when those statutes were enacted. Thus, if the Court lacks jurisdiction, it could only be because defendants enjoy an immunity by implication, resulting from an incompatibility between the antitrust laws and the statutes which regulate the telecommunications industry.

The problem created by the tension between the antitrust laws and economic regulation has been long recognized. See, *e.g., United States v. Trans-Missouri Freight Association,* 166 U.S. 290 (1879); 2 A. Kahn, *The Economics of Regulation: Principles and Institutions* 1, 4-5 (1971). Broadly speaking the antitrust laws are rooted in the proposition that the public interest is best protected by competition, free from artificial restraints such as price-fixing and monopoly.[20] The theory of regulation, on the other hand, presupposes that with respect to certain areas of economic activity

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[19]47 U.S.C. §§ 221(a) and 222(c)(1) exempt certain FCC-approved consolidations and mergers of telephone companies.

[20]The antitrust laws are a "comprehensive charter of economic liberty" (*Northern Pac. R. Co. v. United States,* 356 U.S. 1, 4 (1958)) whose goals have been described in many ways, from the advancement of consumer welfare (Bork, *The Antitrust Paradox* (1978), pp. 50-66) to the more radical objective of the diffusion of power in economic decision-making (A. Neale, *The Antitrust Laws of the USA* (2d ed. 1970), pp. 427-432; and Mr. Justice Douglas' dissent in *United States v. Columbia Steel Co.,* 334 U.S. 495, 536 (1948). See also, P. Areeda and D. Turner, Antitrust Law, vol. 1, par. 103, et seq. (1978).

the judgment of expert agencies may produce results superior to those of the marketplace,[21] and that for this reason competition in a particular industry will not necessarily serve the public interest.[22] Because of these divergent objectives, it could be, and has been, argued that whenever the Congress has established a scheme of regulation through an independent commission, it must be deemed to have determined that the antitrust laws should not apply to the industry thus being regulated. That, however, is not the law.

The Supreme Court has repeatedly noted that "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *Otter Tail Power Co. v. United States,* 410 U.S. 366, 373 (1973), quoting *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963). Accord, *Federal Maritime Commission v. Seatrain Lines, Inc.,* 411 U.S. 726, 733 (1973); *Merrill Lynch, Pierce, Fenner & Smith v. Ware,* 414 U.S. 117, 126 (1973); *Carnation Co. v. Pacific Westbound Conference, et al.,* 383 U.S. 213, 217-8 (1966); *Silver v. New York Stock Exchange,* 373 U.S. 341, 357-8 (1963); *United States v. Borden Co.,* 508 U.S. 188, 198-9 (1939).

Regulated industries "are not per se exempt from the Sherman Act" (*Georgia v. Pennsylvania R. R.*

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[21]However, regulatory agencies sometimes seek to achieve their objectives, at least in part, through the fostering of competition.

[22]This may be so because the market is one of natural monopoly, in that it is incapable effectively to support more than one firm, or because of other economic, public policy, or political reasons.

Co., 324 U.S. 439, 456 (1945)),[23] and they are not necessarily exempt even if the conduct complained of in an antitrust context has been expressly approved by the agency charged with regulating the particular industry.

In *United States v. Radio Corporation of America*, 358 U.S. 334 (1959), a decision by the Federal Communications Commission specifically approving an exchange of television stations was asserted as a defense to an antitrust divestiture action. The Supreme Court rejected that contention, holding, as Mr. Justice Harlan expressed it in his concurring summary of the Court's decision (358 U.S. at 353), "a Commission determination of 'public interest, convenience, and necessity' cannot either constitute a binding adjudication upon any antitrust issues that may be involved in the Commission's proceeding or serve to exempt a licensee pro tanto from the antitrust laws. . . ."[24] See also *California v. Federal Power Commission*, 369 U.S. 482 (1962); *United States v. Philadelphia National Bank*, *supra*; *Otter Tail Power Co. v. United States*, *supra*.[25]

[23]The antitrust laws apply notwithstanding regulation in such industries as the production of natural gas (*California v. Federal Power Commission*, 369 U.S. 482 (1962)); generation and transmission of electric power (*Otter Tail Power Co. v. United States*, *supra*); national banking (*United States v. Philadelphia National Bank*, *supra*); securities and commodities exchanges (*Silver v. New York Stock Exchange*, *supra*; *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973)); and broadcasting (*United States v. Radio Corporation of America*, 358 U.S. 334 (1959)).

[24]If the law were otherwise, the specific statutory immunity granted, for example, to telephone companies with respect to certain FCC-approved mergers (see Note 19, *supra*), would be redundant and unnecessary. See *Wilderness Society v. Morton*, 156 U.S. App. D.C. 121, 479 F.2d 842, 856 (1973), *cert. denied*, 411 U.S. 917 (1973); *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1974).

These principles have been applied to the area of jurisdiction of the Federal Communications Commission (*United States v. Radio Corporation of America*, *supra*) and to telephone companies specifically. *E.g.*, *Industrial Communications Systems, Inc. v. Pacific Tel. & Tel.*, 505 F.2d 152, 156 (9th Cir. 1974); *International Tel. & Tel. v. General Telephone & Electronics Corp.*, 351 F. Supp. 1153, 1182 (D. Hawaii, 1972), *aff'd. in part and rev'd. in part*, 518 F.2d 913, 918-20 (9th Cir. 1975); *Macon Products Corp. v. Am. Tel. & Tel. Co.*, 359 F. Supp. 973 (C.D. Cal. 1973).

Regulated conduct is, however, deemed to be immune by implication from the antitrust laws in two[26] relatively narrow instances: (1) when a regulatory agency has, with congressional approval, exercised explicit authority over the challenged practice itself (as distinguished from the general subject matter) in such

[25]*Otter Tail* involved a District Court decree which required an electric power utility company to remedy its antitrust violations by establishing certain power interconnections. In response to the company's argument that by reason of the Federal Power Act it was not subject to the antitrust laws, the Supreme Court stated that, absent a direct conflict between the federal judicial decree and an order of the Federal Power Commission concerning specific interconnections, antitrust jurisdiction was not ousted. "It will be time enough to consider whether the antitrust remedy may override the power of the [Federal Power] Commission under § 202(b) as, if, and when the Commission denies the interconnection and the District Court nevertheless undertakes to direct it" (410 U.S. at 377).

[26]The two categories are not clearly distinct, and they sometimes merge in their analysis and application.

a way that antitrust enforcement would interfere with regulation (*Pan American World Airways v. United States*, 371 U.S. 269 (1963); *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975); *United States v. National Association of Security Dealers*, 422 U.S. 694 (1975)), and (2) when regulation by an agency over an industry or some of its components or practices is so pervasive that Congress is assumed to have determined competition to be an inadequate means of vindicating the public interest. *Otter Tail Power Co. v. United States, supra*, 410 U.S. at 373-78; *United States v. National Association of Security Dealers, supra; Silver v. New York Stock Exchange, supra.*

Gordon v. New York Stock Exchange, supra, upon which defendants heavily rely, and *United States v. National Association of Security Dealers* (NASD), *supra*, decided the same day, are the most recent Supreme Court expressions on the kind of analysis that must be applied in determining when an antitrust suit will lie against a member of a regulated industry.

Gordon was an action brought by small investors who challenged a system of fixed stock exchange commission rates sanctioned by the SEC. In its decision, the Court reaffirmed what it had held many times before: that repeal of the antitrust laws is not favored; that repeal will be implied only where there is a plain repugnancy between antitrust and regulatory provisions and then only to the minimum extent necessary; that in the absence of regulatory supervision there can be no conflict; and that both the presence of a pervasive regulatory scheme and the existence of regulatory action under a specific regulatory provision are factors in finding a repeal of the antitrust laws by implication

(422 U.S. at 682-689). The Court then went on to find regulation by the SEC to be such regulatory action, and section 19(b)(9) of the Securities Exchange Act of 1934, 15 U.S.C. § 785(b), which grants to the Commission review power over the fixing of commission rates, to be such a specific regulatory provision.

The Court indicated that in making that determination it was heavily influenced by two factors: (1) by granting to the SEC permission to approve the fixing of commission rates after the Court's decision in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (which had held this kind of rate fixing to be a per se violation of the Sherman Act), the Congress had made a deliberate choice to give the agency the authority to supervise self-regulation with respect to commission rate fixing (422 U.S. at 681, 685), and (2) the Commission had "taken an active role in review of proposed rate changes during the last 15 years" (422 U.S. at 685). Thus it concluded (422 U.S. at 681),

> The statutory provision authorizing regulation, § 19(b)(9), the long regulatory practice, and the continued congressional approval illustrated by the new legislation, point to one, and only one, conclusion. The Securities Exchange Act was intended by Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC. Interposition of the antitrust laws, which would bar fixed commission rates as per se violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity. Implied repeal of the antitrust laws is, in fact,

necessary to make the Exchange Act work as it was intended; failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates.

Similarly, in *NASD, supra,* the Court held that vertical restrictions in secondary market activities designed to maintain prices in brokerage transactions of specified mutual fund shares were precisely among the kinds of restrictions on competition that Congress might have thought were "necessitated by the unique problems of the mutual fund industry . . ." (422 U.S. at 729) when it enacted section 22(f) of the Investment Company Act of 1940, 15 U.S.C. §80a-1 et seq. With respect to the alleged horizontal combination and conspiracy to prevent the growth of a secondary dealer market in the purchase and sale of mutual fund shares, the Court found the SEC's exercise of regulatory authority to be so pervasive as to confer an implied immunity. The Court held "fatal" to the government's complaint that the SEC had consistently and for nearly 35 years approved the restrictive agreements to which the activities the antitrust action sought to curb were ancillary (422 U.S. 733-4), and it found significant the SEC's urging that its authority would be seriously compromised if the agreements were deemed actionable under the Sherman Act (422 U.S. at 729).[27]

[27] *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363 (1972), and *Pan American World Airways v. United States, supra,* also relied on by defendants in this proceeding, involved similarly explicit regulatory schemes. In *Hughes Tool,* the Court found that the challenged transactions fell precisely within the detailed scheme for administrative treatment established by Congress in section 408 of the Federal Aviation Act of 1958, 49 U.S.C. § 1378, and that, inasmuch as the Civil Aeronautics Board had issued an order under that section approving them, the transactions were immunized from the antitrust laws by section 414 of the Act, 49 U.S.C. § 1384. Similarly, in *Pan American Airways,* the Court held that section 411 of the Federal Aviation Act of 1948, 49 U.S.C. § 1381, had granted to the CAB the very jurisdiction (over unfair competition in air traffic) that was at the heart of the antitrust complaint.

Thus, the inquiry in this case must focus upon (1) whether the activities which are the subject of this complaint were required or approved by the Federal Communications Commission pursuant to explicit statutory authority, in a way that is incompatible with antitrust enforcement, and (2) whether these activities are being so "pervasively" regulated that an immunity from antitrust action must be assumed. In my judgment, these questions must be answered in the negative.

We do not start with a clean slate, neatly balancing whether there should or should not be antitrust jurisdiction. The complaint alleges serious violations of the Sherman Act, and if the government is able to prove these allegations, it follows that a substantial violation of that fundamental charter of American economic life has occurred. The burden is on defendants to demonstrate that they or their practices were intended to be exempt or immune from the broad mandate of the Act. To carry that burden, defendants rely on the Supreme Court decisions discussed above which found certain companies to be immune from the antitrust laws based upon a degree of regulation by government agencies which, as a practical matter, left them no choice but to follow the regulatory schemes and orders. But such regulation is not present in this case.

At the outset, it must be noted that two of the defendants in the instant action, Western Electric and Bell Labs, are not subject to direct regulation by the

Federal Communications Commission at all. Defendants' assertion that "each of the general charges of alleged conduct . . . relates to matters which are within the jurisdiction of the regulatory agencies" (Status Memorandum, p. 5), is contradicted by the more precise and more accurate statement of the Federal Communications Commission (Memorandum as *amicus curiae*, filed December 30, 1975, pp. 21-25) that it "has no direct regulatory responsibility for . . . Western Electric and Bell Laboratories," although it may indirectly affect them through its determinations of the reasonableness of expense and rate base items claimed by AT&T. See *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). Legislative history over the years shows that congressional concern over AT&T's intra-corporate structure never matured beyond directing the Federal Communications Commission to conduct a study. Once that study was completed (Federal Communications Commission, *Report on the Investigation of the Telephone Industry in the United States*, H.R. Doc. No. 340, 76th Cong., 1st Sess. (1939)), Congress took no further action, nor was the Commission given authority to take further action.

Consequently, it has been the Federal Communications Commission's consistent position that it has no authority to alter, regulate, or otherwise to interfere with AT&T's internal structure, including its relationships with Western Electric and Bell Labs. See Federal Communications Commission, *Report on the Investigation of the Telephone Industry in the United States*, *supra*, at 487-589; Consent Decree Program of the Department of Justice, *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary*,

85th Cong., 2d Sess. Part II-Vol. II (1958);[28] Consent Decree Program of the Department of Justice, *Hearings before the Antitrust Subcommittee of the House Committee of the Judiciary*, 85th Cong., 2d Sess. Part II-Vol. III (1958);[29] Antitrust Problems of the Space Satellite Communications System, *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. 281 (1962);[30] *AT&T Charges for Interstate Telephone Service (Phase II)* 64 FCC.2d 1 (1977), pp. 15, 18, 20, 27; and see *International Tel. & Tel. Co. v. General Telephone & Electronics Corp.*, 518 F.2d 913 (9th Cir. 1975). Beyond broad general statements, defendants have cited nothing to the contrary. In view of this history, it is difficult to see on what basis Western Electric, Bell Labs, or the relationships involving them, could be considered immune from the antitrust laws on any theory.

AT&T's Long Lines Department and the Bell Operating Companies are in a somewhat different posture,

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[28]A letter dated November 30, 1955, from Chairman George C. McConnaughey of the Federal Communications Commission to the Attorney General, introduced at the 1958 hearings, states that "the operations of Western, including its prices and profits, are, of course, not subject to direct control by any regulatory authority." Consent Decree Program of the Department of Justice, *supra*, vol. II at 2233-34.

[29]Bernard Strassburg, Chief of the Telephone Division of the Federal Communications Commission, testified in those hearings that the Commission lacks the authority to directly regulate Western Electric. Consent Decree Program of the Department of Justice, *supra*, vol. III at 3446, 3543-44.

[30]Chairman Newton N. Minow of the Federal Communications Commission testified before the Committee in 1962 that "we have no statutory authority to regulate the prices charged by Western Electric for its equipment sales to the American Telephone & Telegraph Co." Antitrust Problems of the Space Satellite Communications System, *supra* at 283.

for they are subject to FCC regulation in a variety of ways, and the Commission has to a substantial extent exercised this authority. See, *e.g., Specialized Common Carrier Services,* 29 FCC.2d 870, 31 FCC.2d 1106 (1971), *aff'd. sub nom., Washington Utilities and Transportation Commission v. Federal Communications Commission,* 513 F.2d 1142 (9th Cir. 1975), *cert. denied sub nom., National Association of Regulatory Utility Commissioners v. Federal Communications Commission,* 423 U.S. 836 (1975); *MCI Communications Corp. v. Am. Tel. & Tel. Co.,* 496 F.2d 214 (3rd Cir. 1974). But there is nothing in either the Communications Act or the related statutes to suggest that, with respect to the activities and relationships[31] which are significant to this case, Congress intended to vest in the Federal Communications Commission such pervasive regulatory authority as to override antitrust considerations, nor is there anything to indicate that the antitrust laws are incompatible with the operation of these regulatory statutes as intended by the Congress.

The situation here is thus considerably different from that presented in *Gordon v. New York Stock Exchange, supra.*[32] In *Gordon* the Supreme Court said that the antitrust laws could not be applied where the Congress had given the Securities and Exchange Commission

[31]*E.g.,* relationships with private mobile radio systems, radio common carriers, miscellaneous common carriers, specialized common carriers, and manufacturers and sellers of terminal equipment for communications systems.

[32]The distinction is significant inasmuch as *Gordon,* and its companion case *United States v. National Association of Security Dealers,* represent the outer limits of the Supreme Court's application of the implied immunity doctrine. Other Supreme Court law is even more hospitable to the antitrust laws and less apt to imply an immunity.

exclusive jurisdiction to supervise the fixing of rates of commission for transactions on the stock exchanges and where the Securities and Exchange Commission had in fact exercised that jursdiction. By contrast, the Federal Communications Commission has not been granted exclusive jurisdiction over what may be called the interconnection areas,[33] but by statute shares that jursdiction with the courts. 47 U.S.C. § 406.[34]

More importantly, the regulatory charter of the Commission itself, while broad in many respects, is at the same time relatively weak. For example, telephone tariffs—a primary regulatory tool—become effective upon filing by the carrier after 90 days notice without the necessity for Commission scrutiny or approval (47 U.S.C. § 203(b)(1)); a carrier may file a new or revised tariff at any time (47 U.S.C. § 204); and the power of the Commission to suspend a tariff is limited to a five-month maximum (47 U.S.C. § 204). The weakness of the regulatory scheme is reinforced by a volume of tariff filings beyond the capacity of the Commission to handle. During the 12-month period from September 1974 through August 1975, the Commission received 1,371 tariff filings totaling 11,491

[33]In addition to certain claimed violations with respect to manufacturing, research, and sales and purchases of the fruits of manufacturing and research, much of this suit involves defendants' alleged failure to allow various types of entities to interconnect.

[34]Section 406 provides that "the district courts of the United States shall have jurisdiction . . . [of allegations of] any violation, by a carrier subject to this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other persons." See also, 47 U.S.C. §§ 207, 407, 414.

pages, and because of this volume, it was able to investigate only a small percentage of the tariffs. Thus, it is not surprising that the Commission has concluded that "rate filings generally proceed from the carrier's independent judgment. . . ." Memorandum of FCC, filed December 30, 1975, pp. 19-20.

The statutory weaknesses, the general inability of the Commission to scrutinize all the tariffs submitted to it, and perhaps other factors (*e.g.*, the lack of adequate resources effectively to regulate AT&T, a corporate giant),[35] have produced the result of a far less than pervasive or specific regulation of the areas that are critical to this case. In any event, whatever the reasons, it is clear that regulation of defendants' conduct has not been such that this antitrust action would disturb or interfere with it.[36]

The FCC—unlike, for example, the SEC in the stock exchange cases—has consistently taken the position that antitrust enforcement through court action is not precluded in this area.[37] *In the Matter of Amendment of Subpart F of Part 1 of the Commission's Rules*, 42 FCC 905, 906, 910-912 (1959); *In the Matter of the Applications of the Connecticut Water Co. & Woolridge Bros., Inc.*, 25 FCC 1367, 1378

[35]See, *e.g.*, Business Week, *Why the Justice Department Took AT&T to Court*, (Nov. 30, 1974) pp. 68-70.

[36]Even when the regulation is "pervasive," and the precise conduct attacked in an antitrust suit is being regulated, an immunity will be found only if the antitrust remedy conflicts with rather than complements the enforcement efforts of the regulatory agency. *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), *vacated and remanded on other grounds*, 46 U.S.L.W. 4719 (June 19, 1978).

[37]An agency's consistent construction of its own enabling legislation is entitled to considerable weight. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 1969).

(1958). In its memorandum filed with the Court in this case on December 30, 1975, the Commission noted (p. 27):

> To the Commission's knowledge, no court has ruled that the regulatory jurisdiction of the FCC and/or state agencies has ousted entirely the antitrust jurisdiction of the district courts. Several courts have expressly rejected that argument, and have held that primary jurisdiction referral is the appropriate accommodation . . . The Commission has accepted primary jurisdiction referrals in many cases, has resolved the issues referred for its consideration, and has certified back the results for the courts' ultimate determination . . . This procedure has satisfactorily accommodated the regulatory requirements, and the Commission believes it to be preferable to total ouster of the antitrust courts.

Among the considerations it cited in support of its position, the Commission stressed, *inter alia*, that, while under section 214 of the Communications Act, 47 U.S.C. § 214, it has exclusive market entry authority, antitrust actions not only do not necessarily conflict with that authority, but might even complement it in appropriate circumstances; the courts and the Commission have concurrent responsibilities, but when there is a conflict, the doctrine of primary jurisdiction[38] is adequate to resolve the matter; the Commission has never considered its authority over equipment interconnection to displace the antitrust laws; and even with respect to tariffs, since, as noted *supra*, they often become effective without Commission scrutiny

[38]See note 45, *infra*.

or approval, the courts appropriately exercise antitrust jurisdiction.[39]

An examination of the complaint in this proceeding against the implied immunity doctrine and its philosophic underpinnings verifies the Commission's conclusion.[40] The allegations of the complaint describe

[39]The Commission considers, however, that when it has prescribed or specifically approved a tariff, its judgment must control (FCC Memorandum of December 30, 1975, p. 20).

[40]While the district court decisions are not entirely consistent in this area, the better-reasoned cases likewise support these conclusions. In *Jarvis v. Am. Tel. & Tel.*, Civ. 74-1674 (D.D.C. August 7, 1978), Judge Robinson of this Court held that Commission regulation of interconnection and tariffs over this defendant is not so pervasive that regulatory control should be deemed inconsistent with the application of the antitrust laws. See also, *Industrial Comm. Sys. Inc. v. Pac. Tel. & Tel. Co.*, 505 F.2d 152, 156 (9th Cir. 1974); *Macon Products Corp. v. Am. Tel. & Tel. Co.*, 359 F. Supp. 973, 976 (C.D. Cal. 1973). Despite defendants' contention that *Jarvis* is in error (Defendants' Reply to Supplemental Response for the United States), the decision is consistent with both the Supreme Court's and the Feeral Communications Commission's views. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Georgia v. Pennslyvania R. R. Co.*, 324 U.S. 439, 454-460 (1945); Response of Federal Communications Commission in *Am. Tel. & Tel. Co. v. United States*, No. 77-1009 (D.C. Cir.), p. 18. The decisions cited by defendants in this regard are inapposite. *Western Electric Co. v. Milgo Electronics Corp.*, 1978-1 Trade Cases, No. 61,960 (S.D. Fla. 1976), *appeal dismissed*, 508 F.2d 1203 (5th Cir. 1978), involved a question of standing, the court noting only that because of a recent administrative program instituted by the FCC, certain paragraphs of a counterclaim might not be properly before the court. In *Citizens Utilities Co. v. Am. Tel. & Tel. Co.*, 1978-1 Trade Cases, No. 61,959 (N.D. Cal. 1977), the court dismissed a sixteen-year old antitrust case for want of prosecution, stating by way of dictum that dismissal might also be warranted on exclusive or primary jurisdiction grounds because the FCC was the proper forum for the subject matter (division of revenues within the telephone industry). In *Data Corp. v. General Telephone Co. of California*, 1977-2 Trade Cases No. 61,610 (C.D. Cal. 1977), the court dismissed the complaint because of the peculiar subject matter, but expressly disavowed holding "that the telephone companies may never be sued under the antitrust laws," citing Judge Waddy's opinion in the instant case. *Monitor Business Machines, Inc. v. Am. Tel. & Tel. Co.*, 1978-1 Trade Cases, No. 62,610 (C.D. Cal. 1978), and *Phonetele Inc. v. Am. Tel. & Tel. Co.*, 435 F. Supp. 207 (C.D. Cal. 1977), both involved relatively narrow interconnection areas which the courts found to have been extensively regulated by the Federal Communications Commission. In short, all of these cases are distinguishable on their facts. To the extent that some language in the opinions may differ from the conclusion reached here, like Judge Robinson in *Jarvis*, I decline to follow them.

conduct that quite obviously was not stimulated by regulatory supervision or coercion; it is of a character that reflects defendants' business judgment that its profits might be maximized if potential competitors were discouraged from entering the various markets AT&T controls. See *Federal Maritime Commission v. Seatrain Lines, Inc., supra*, 411 U.S. at 733; *Otter Tail Power Co. v. United States, supra*, 410 U.S. at 374; *Silver v. New York Stock Exchange, supra.*

According to the complaint,[41] defendants have chosen to engage in a variety of predatory activities designed to shut out potential competitors from the telecommunications markets, including the denial to competing entities of interconnection privileges with AT&T's monopoly facilities; unlawful rate adjustments in response to competition; refusal to permit telephone customers to provide their own terminal equipment and to interconnect it to AT&T's network; and perpetuation of various production and marketing practices designed to curb competition. There is absolutely nothing to suggest that Congress expected the Commission to require or approve, or that the Commission did require or approve any of these practices. These activities not only violate the antitrust laws but they are also inconsistent with the purpose of the regulation, or at the very least they are not required or encouraged either by regulatory theory or by regulatory action.

[41]See pp. 1-2, *supra.*

In such a posture, the abstract philosophical differences between regulation and competition will hardly serve to oust the antitrust laws from their normal function and effect. The purpose of the implied immunity rule is to eliminate adherence to antitrust standards when there are irreconcilable differences between the antitrust laws and federal regulatory statutes.[42] But the antitrust laws cannot be held hostage to a supposed irreconcilability between antitrust and regulatory enforcement when no such irreconcilability exists in fact, nor can the alleged unlawful actions fo defendants be deemed protected from the Sherman Act by the cloak of generalized regulation of AT&T by the Commission.

In short, it would be a gross misconception of the realities to equate the instant statutory scheme, the relatively weak regulatory controls which have implemented that scheme, and defendant's alleged activities which offend both the antitrust laws and the regulatory purposes, with the kind of explicit regulation endorsing industry conduct which the Supreme Court has held in relatively few instances to be inconsistent with antitrust enforcement.[43]

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[42]Immunity will be implied only if necessary to make the regulatory statutes work, "and even then only to the minimum extent necessary." *Gordon v. New York Stock Exchange, supra,* 422 U.S. at 685.

[43]Additionally, it is not insignificant that, even with respect to that portion of defendants' activities which the Commission does regulate, only the courts can grant complete relief. The Commission has little authority to vindicate injury to competitors; there is no statutory provision authorizing it to order divestiture; and it is unable to adopt remedies designed to foreclose future anticompetitive conduct. See generally, *Am. Tel. & Tel. Co. v. FCC,* 487 F.2d 865, 881 (2d Cir. 1973); *Nader v. FCC,* 172 U.S. App. D.C. 1, 520 F.2d 182, 206 (1975); cf. *Hewitt-Robins v. Freight-Ways, Inc.,* 371 U.S. 84 (1962); but see, *General Telephone Co. of the Southwest v. United States,* 449 F.2d 846 (5th Cir. 1971). Congress could hardly be deemed by implication to have conferred immunity on carriers such as these defendants when the effect of its assumed action would be to insulate the alleged antitrust violators from effective sanctions or relief.

There is another, alternative basis for reaching the same conclusion. This complaint alleges a broad conspiracy to monoplize various aspects of the telecommunications industry through a symbiotic relationship among AT&T, Western Electric, Bell Labs, and the Bell Operating Companies (see p. 2, *supra*). Even if it be assumed, *arguendo*, that the Commission exercised explicit regulatory authority over only some segments of the activities challenged in the complaint, it does not follow that defendants are immune from antitrust liability even with respect to them. Defendants' purpose is alleged to be the monopolization of the telecommunications service and equipment market, and the bulk of their conduct, including that revolving around Western Electric and Bell Labs, cannot under any reasonable view be regarded as immune from antitrust enforcement by virtue of regulation. In that circumstance, the remainder of the challenged conduct is likewise subject to antitrust consideration, both because it constitutes a means for achieving an unlawful end (*California Motor Transport v. Trucking Unlimited,* 404 U.S. 508, 515 (1972)), and because it represents one facet of a larger monopolistic scheme. See *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 222 (1966); *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962); *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 316 (1973) (Marshall, Jr., dissenting).

According to the government (Brief in *Am. Tel. & Tel. Co. v. United States,* No. 77-1109 (D.C. Dir.),

pp. 5-6), defendants dominate three markets—long distance transmission, equipment manufacturing, and local franchise monopolies—and they use the leverage from their control of each to defend and support their monopoly position in the other two. It is precisely in this kind of situation, that the doctrine of primary jurisdiction is most useful,[44] and this Court is fully prepared to refer appropriate issues to the FCC under that doctrine (see note 45, *infra*). But it would subvert the purposes of the antitrust laws totally to sever from the case and to refer to the Commission some of the issues on the theory that it has exclusive jurisdiction when the consequence of such a referral would be that a significant portion of what is alleged to be one comprehensive, integrated, and mutually supporting conspiracy could never be considered by the courts. See *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945). This would then leave the courts with a truncated antitrust action—a result that would stand the principle of careful non-interference between legitimate regulatory and antitrust enforcement on its head.

While it is not necessary here to rely directly upon these "comprehensive monopoly" principles in adjudicating the jurisdictional issue, they provide additional and alternative support for the conclusion that antitrust jurisdiction has not been ousted by the regulatory scheme.

For these reasons, the Court rejects defendants' contention that the Court lacks antitrust jurisdiction over the matters alleged in the complaint. However, in the event that it should subsequently appear after the issues have been crystallized—*e.g.*, after discovery has been

[44]See Mr. Justice Brennan's dissent in *Pan American World Airways v. United States, supra*, 371 U.S. at 331-2.

completed—that with respect to some of defendants' conduct the Commission has special expertise or there may be a conflict between antitrust enforcement and regulation, the issues relating to such conduct will be referred to the Commission under the doctrine of primary jurisdiction.[45] But there is no basis for defendants' continued insistence that the jurisdictional issue[46] is not settled[47] or that, until it is settled in

[45]While the term "primary jurisdiction" has been widely used, including by the U.S. Supreme Court, it deserves some clarification. A referral under that doctrine does not oust a court of jursidiction; it merely serves as a means for requesting a regulatory agency to make preliminary factual and legal determinations while reserving to the court the authority to decide the ultimate questions. Judge Waddy's opinion of November 24, 1976 concluded that some of the issues herein might be referred to the FCC under that doctrine. It is clear from *Ricci v. Chicago Mercantile Exchange, supra*, that such a referral is appropriate particularly where there is a need to resolve possible conflicts between the objectives of the antitrust laws and the regulatory standards, and where an adjudication of such issues by the regulatory body will be of material aid in the ultimate decision of the antitrust issues. It is my intention, as it was Judge Waddy's, to make such appropriate references to the FCC. According to the Commission (Memorandum as *amicus curiae*, p. 29) issues which substantially affect the following matters should be referred to it under the principle of primary jurisdiction: (1) entry into or exit from a communications carrier market; (2) FCC orders requiring interconnection; and (3) tariff provisions which the Commission has approved or precluded. It would be premature at this point to conclude the extent to which these conditions exist with respect to particular issues in this case, or whether there may be other matters appropriate for referral to the Commission.

[46]*I.e.*, the issue of whether or not the Commission has *exclusive* jurisdiction.

[47]Throughout their status memoranda, defendants assert that there must be "a prompt determination of the jurisdictional issue" (Reply Memorandum, p. 3), that the means to expedite this case is to have "an early and definitive resolution of the fundamental jurisdictional issue that overhangs all of the proceedings in this case" (Reply Memorandum, p. 49), and that the Court will have to resolve "once and for all *whether*—and, if so, the extent to which—it has jurisdiction" (emphasis supplied) (Status Memorandum, p. 47)).

their favor, it is not possible to proceed with this case in a way that is fair to both parties. The issue was decided against defendants by Judge Waddy, and his decision was not disturbed either by the U.S. Court of Appeals or the U.S. Supreme Court. Upon careful reconsideration, this Court again reaches the conclusion that it has jurisdiction of this action and that no part of this case is within the exclusive jurisdiction of the Federal Communications Commission.[48]

II

Defendants have submitted a proposed order providing that "the plaintiff in this case is the government of the United States of America including all of the departments, agencies, bureaus, and other subdivisions thereof from which defendants have sought recovery." The effect of this order, if adopted by the Court, would be to subject all agencies and departments of the government to discovery under Rule 34 of the Federal Rules of Civil Procedure. The Department of Justice argues that only it is a party, and that discovery from other government agencies and departments must proceed under the more restrictive provisions of Rule 45, F.R.Civ.P. The question that is raised by these opposing positions is "who is the plaintiff?"

It should be noted at the outset that some discovery has been and is being secured to a limited extent from government agencies other than

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[48]For that reason defendants' proposed Pretrial Order No. 9 which would limit discovery to the jurisdictional issues *seriatim*, followed in each instance by further briefing and court review, is denied.